IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1878

THE SEBRING UTILITIES COMMISSION, THE FORT PIERCE UTILITIES AUTHORITY OF THE CITY OF FORT PIERCE, THE GAINESVILLE-ALACHUA COUNTY REGIONAL ELECTRIC WATER & SEWER UTILITIES, and the CITIES OF HOMESTEAD, KISSIMMEE, LAKELAND, STARKE and TALLAHASSEE, FLORIDA,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

APPENDICES

CERTIFICATE OF SERVICE

TABLE OF CITATIONS

STATUTES AND REGULATIONS

Administrative Procedure Act

Natural Gas Act

MISCELLANEOUS

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OPINIONS BELOW

The opinion of the Court of Appeals is captioned *Sebring Utilities Commission, et al.* v. *Federal Energy Regulatory Commission*, CA5 Nos. 77-2911 and 77-2972 (March 20, 1979)

and is attached as Appendix A, pp. A-l-A-35. The orders of the Federal Energy Regulatory Commission (or its predecessor, the Federal Power Commission) reviewed by the Fifth Circuit, which are not yet reported, are *Lehigh Portland Cement Co.* v. *Florida Gas Transmission Co.*, Opinion 807 ("Opinion and Order Receiving Filing of Curtailment Plan", June 24, 1977, R2207-2224L)[1], App. C-1, at. A-39-A-63 ; Opinion 807-A ("Opinion and Order Denying Rehearing in Part and Denying Stay in Part", September 22, 1977, R2455-2465L), App. C-2, pp. A-65-A-79; ("Order Denying Rehearing", November 21, 1977; R2512-1515L), App. C-3, pp. A-81-A-86 ; *Ft. Pierce Utility Authority of the City of Ft. Pierce*, v. *Florida Gas Transmission Company*, ("Order Dismissing Petition and Complaint, Granting Motions to File Responses, and Permitting Interventions," August 3, 1977, R362C-367C), App. C-4, A-87-A-94 ; ("Order Denying Applications for Rehearing and Denying in Part Motion for Clarification", September 30, 1977, R295C-399C), App. C-5, A-95-A-100.

JURISDICTION

The judgment of the Court of Appeals was entered March 20, 1979 (App. B, p. A-38). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. §717r(b). Jurisdiction is also invoked pursuant to §10 of the Administrative Procedure Act, 5 U.S.C. §§702-706.

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[1]Designations refer to the Joint Appendix. Suffices L and C indicate the *Lehigh Portland Cement* case, *supra*, and the *Ft. Pierce Utility Authority* case, *infra*, respectively. JA refers to the Fifth Circuit Joint Appendix page numbers. Prefix R is the record page as certified by the Commission.

QUESTIONS PRESENTED

1. Does the Federal Energy Regulatory Commission have jurisdiction under §1(b) of the Natural Gas Act, 15 U.S.C §717(b) to curtail gas transported by an interstate pipeline company as part of a commingled gas stream, regardless of who owns the gas?

2. In determining the above jurisdictional issue, was the Federal Energy Regulatory Commission required to consider allegations of wrongdoing and of severe anticompetitive impact from an adverse order?

STATUTE INVOLVED

The statute involved is §1(b) of the Natural Gas Act, 15 U.S.C. §717 (b):

> (b) The provision of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution or to the production or gathering of natural gas.

PROPRIETY OF THE RELIEF REQUESTED AND FURTHER STATEMENT OF FEDERAL JURISDICTION IN THE FIRST INSTANCE

This case presents the important Federal question of the Federal Energy Regulatory Commission's jurisdiction to allocate natural gas transported by interstate pipelines, but "owned" by

the purchaser during transportation. Lack of jurisdiction would provide a means whereby some sellers and users of gas can escape curtailment jurisdiction in time of national energy shortage, leaving the burden of curtailments entirely on a diminishing group of customers dependent upon vital utility gas services. Thus, the issue presented is of major importance. Further, as this case illustrates, a holding affirming the limitations sought to be placed on the Commission's jurisdiction would permit—indeed, require—natural gas curtailment regulation (i.e., the breaking of gas delivery contracts by Government edict and transfer of gas to others) to be exercised without regard to blatant wrongdoing, discrimination and anticompetitive activities in the supply and use of the transported natural gas.

The above issues were raised before the Federal Energy Regulatory Commission, pursuant to jurisdiction granted by §1 of the Natural Gas Act, 15 U.S.C. §717(b), and adverse rulings were appealed to the Fifth Circuit, pursuant to §19b, 15 U.S.C. §717r(b). These orders are attached as Appendix C.

Certiorari review is justified because of the importance of the jurisdictional question presented in time of energy crisis; the severe hardship resulting from the rulings below to hundred's of thousands of Florida electric ratepayers, who will have to pay substantially higher rates for vital electric utility services due to a sanctioning of blatantly discriminatory curtailments; and, as is discussed at 11-19, *infra*, the failure of the Fifth Circuit to follow three recent decisions of this Court.

STATEMENT OF THE CASE

Petitioners, Florida Cities, are all cities in Florida, or their related authorities in Florida, ranging in size from Starke to Tallahassee, the State's capital[2]. They each operate municipally owned utilities for the benefit of their residents and ratepayers. (R171C)

Due to a severe natural gas shortage, Florida Cities supplier, Florida Gas Transmission ("FGT") pipeline, could not fulfill its gas supply contracts. The result has been great economic dislocation for Florida Cities as well as for other pipeline and gas distribution company customers. (R174-175C; 2209-2211, 2217, 221L; JA520-527).

Against the backdrop of a nationwide gas shortage, which affects not only FGT, but natural gas users throughout the country, in *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972), this Court held that the Federal Energy Regulatory Commission[3] can reallocate natural gas supplies among pipeline users pursuant to §1b of the Natural Gas Act, 15 U.S.C. 717(b). Natural gas is an essential resource, used for heating, cooking and diverse feedstock uses (e.g., plastics, chemicals, fertilizers) as well as for generating electricity.

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[2]Florida Cities include the Ft. Pierce Utilities Authority of the City of Ft. Pierce, the Gainesville-Alachua County Regional Electric Water & Sewer Utilities, the Sebring Utilities Commission and the Cities of Homestead, Kissimmee, Lakeland, Starke and Tallahassee, Florida.

[3]For convenience, the Federal Energy Regulatory commission, sometimes referred to as "FERC" or "the Commission", includes its predecessor agency, the Federal Power Commission ("FPC").

In a case before FERC, where certain industrial users challenged the existing natural gas curtailment plan of FGT as unduly discriminatory[4], Florida Cities and other contended that if gas were to be taken from them and reallocated to industrial users, so-called transportation gas should not be exempt from curtailments.

In a separate proceeding, Florida Cities requested curtailment of the "T-3"[5] "transportation" gas[6]. This case considers whether "transportation" gas is exempt from FERC's curtailment jurisdiction.

Transportation gas is gas sold to the ultimate user at points of production and before transportation, as distinguished from conventional arrangements under which gas is sold to the ultimate user by a gas distributor or pipeline; under conventional arrangements the pipeline (not the ultimate user) buys the gas from the producer. The exclusion of "transportation" gas from the Commission's curtailment jurisdiction would place the entire burden on customers who purchase gas from interstate pipeline or gas distribution utilities and would totally relieve large purchasers who can buy gas directly from gas producers.

To petitioners knowledge, the largest transportation gas arrangement in the United States involves a sale by Amoco Production Company ("Amoco") and Austral Oil Company

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[4] *Lehigh Portland Cement Co.* v. *Florida Gas Transmission Co.*, ____ F.P.C. ____, (Opinion 807, June 24, 1977, R2207-2224L) App. C-1, pp..

[5] Florida Gas Transmission Co. transportation gas tariffs are called T-1, T-2 and T-3, respectively.

[6] *Ft. Pierce Utility Authority of the City of Ft. Pierce*, v. *Florida Gas Transmission Co.*,. ____ F.P.C. ____ (August 3, 1977, R362C-367C).

("Austral") to Florida Power & Light Company ("FP&L"), Florida's largest electric utility. Under a certificate issued by FERC, gas is transported by Florida Gas Transmission Company ("FGT"), a major interstate pipeline, from producing fields in Texas and Louisiana to FP&L's generating plants in the Florida peninsula (R202-206). *Florida Gas Transmission Co.*, 37 F.P.C. 424, 425, 427 (1967), *affirmed, Florida Economic Advisory Council* v. *FPC*, 251 F.2d 643 (1957), *certiorari denied*, 356 U.S. 959 (1958). At the time of the close of the record, approximately 61% of FGT's total gas service was comprised of transportation gas to FP&L and to Florida Power Corporation, Florida's second largest utility. (Exhibit 23-A, R1505L)[7]

In their complaint[8], and in the curtailment proceedings, Florida Cities contended that, apart from contractual form, the

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[7] Two smaller transportation contracts, one to FP&L and one to Florida Power corporation will soon expire by their contract terms. However, the Amoco-Austral contract will not expire until 1986. This contract alone accounts for deliveries of 200,000 MMBTU per day, or 27% of FGT's total capacity (R.206C), which far exceeds *total* gas deliveries to petitioners combined. While it may be anticipated that the percentage amount of transportation gas will decline, additional transportation gas contracts may increase the total.

[8] In part, Florida Cities' complaint resulted from the Fifth Circuit decision in *Ft. Pierce Utility Authority*, v. *FPC*, 526 F.2d 993 (1976). In *Ft. Pierce*, before FERC certain industrial customers of FGT had requested and received in part, extraordinary relief from FGT's curtailment plan. Thus, they received more gas than that to which they were entitled both under their contracts and under the FGT curtailment plan. Florida Cities argued: (1) that the Commission did not have jurisdiction to transfer gas solely among nonjurisdictional (i.e., direct sale customers), since under §1(b) of the Natural Gas Act, 15 USC §717(b), the Commission's jurisdiction is limited to sales for resale, but (2) if such jurisdiction existed under the Commission's regulatory

transportation gas was functionally equivalent to the gas that they use. In both instances gas was produced by independent producers, sometimes from the same gas fields, gathered and delivered to FGT's pipeline, transported in a large interstate pipeline over long distances as part of a commingled gas stream, processed and ultimately delivered to generating plants in Florida to make electricity. (*E.g.*, R171-172, 180, 185, 216C)

Florida Cities contended further that it was both discriminatory and anticompetitive to allow the largest utility in Florida uncurtailed availability of huge amounts of natural gas supply, when smaller competing utilities were almost totally curtailed[9] (R173-176, 190C). Florida Cities alleged that the situation threatened to force them from business (R174-176, 186-190, 193-195, 213-216C). At the time of record, direct

authority over transportation, then the transportation gas should bear its *pro-rata* share of additional curtailments from the extraordinary relief. The Fifth Circuit ruled that the Commission has authority to transfer the Cities' gas to the industrial customers, citing this Court's decision in *Louisiana Power & Light Company, supra*, 406 US 621. However, that court ruled that in order to seek any curtailment of the transportation gas, Florida Cities would be required to file a separate petition and complaint, which the Florida Cities did, leading to this case.

[9]Florida Power & Light "generates approximately 25% of its energy with natural gas, obtained pursuant to its T-2 and T-3 contracts with FP&L. An additional 25% of its generation is nuclear powered. . ." (R174C)

interruptible customers, such as the Florida Cities were estimated to be curtailed 287.5 days of the year. *Decision*, at 3531, n.10. Finally, Florida Cities contended that "appropriate discovery" was necessary to determine whether the T-3 contract had resulted from illegal "secret arrangements" under which FP&L had received a gas preference, thereby sacrificing gas deliveries necessary for FGT's consumers[10]

On jurisdictional grounds, the Commission ruled, however, that since the purchaser, FP&L, rather than the producer,

[10]Support for this contention is found in Commission decisions rejecting a gas settlement on the basis of alleged illegal activity and directing an investigation into possible violations of the Natural Gas Act and Commission regulations. In summary, the Federal Energy Regulatory Commission staff had accused FGT and Amoco of entering into a secret agreement under which FP&L would receive a preference in deliveries of gas supplies over gas for FGT to serve FGT's other customers. Moreover, it was also alleged that in order to secure the T-3 arrangements, FGT had initially agreed to take more gas from Amoco, forcing it to sell off gas reserves for its customers. Additional gas takes in early years reduced gas deliveries in later years, leading to subsequent large curtailments. "Order Rejecting Settlement and Directing Office of Enforcement to Institute Investigation", *Florida Gas Transmission Company*, Docket No. CP74-192 (August 21, 1978); *Florida Gas Transmission Company*,, Docket No. IN78-2 (August 28, 1978). The Commission has rejected FP&L's co...entions that it should be dismissed from such investigation. *Id*, "Order on Motions for Clarification", *Florida Gas Transmission Co., Docket No. CP74-192 (May 8, 1979, p.2., n.4)*. *Accord*, "Order Directing Private Investigation . . .", *supra*, stating: "Also apparent from the record in

> Docket No. CP74-192 is the significance of certain contractual obligations between FGT and Amoco with Florida Power and Light Company ("FP&L") in the above-mentioned contract amendment. Accordingly, FP&L shall be subject to investigation in these matters."

"owns" the gas at the time of transportation, FERC has no jurisdiction to curtail the gas (R366C, 2463L)[11].

Florida Cities appealed to the Fifth Circuit. They contended that the Commission's decision that transportation gas is exempt from curtailment is flatly contrary to the Court's decision in *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972); *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965) and the just decided *California* v. *Southland Royalty Co.*, 436 U.S. 519 (1978). Florida Cities contended further that the result was unduly discriminatory in violation of §4(b) of the Natural Gas Act, 15 U.S.C. §717c(b), not supported by substantial evidence and

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[11] In the context of the FGT curtailment case in *Lehigh Portland Cement Co.* v. *Florida Gas Transmission Co.*, *supra*, the Commission likewise refused to consider issues relating to the transportation gas. (R2462L) The Commission held FGT's curtailment plan unlawful, stating: "The essence of the principle [of avoidance of undue discrimination or preference] is that those who are similarly entitled must be treated equally regardless of their ability to survive otherwise." (R2215L). Thus, the Commission holds FGT's curtailment plan unlawful without demanding a showing of competitive disadvantage, because, based upon whether they purchase directly from FGT or from a gas distribution company, competing cement companies get different amounts of gas. However, as a corrective, the Commission would transfer gas from municipally owned generating systems to Lehigh without even considering their competitive situation vis-a-vis Florida Power and Light Company, where there is evidence of attempted FP&L takeovers of independent municipal systems (R193-195; 214-216C). According to the rulings below, FP&L receives and will receive gas on a totally uncurtailed basis, even if all other customers are being curtailed because of gas shortages (R172, 203C).

unlawfully in support of anticompetitive activities. Since Florida Cities believe that the Fifth Circuit decision affirming the Commission limits the jurisdiction of FERC over an increasingly important aspect of gas deliveries in interstate commerce, i.e., transportation gas, creating potentially great discriminatory and anticompetitive impacts and since they believe the decision is contrary to at least three recent decisions of this Court, they seek *certiorari* review.

ARGUMENT

I. Because The Fifth Circuit Has Ruled Directly Contrary To At Least Three Recent Decisions Of This Court With Regard To An Important Jurisdictional Matter, *Certiorari* Is Justified

The Federal Energy Regulatory Commission has held that gas owned by Florida Power and Light Company and transported in a commingled gas stream through five states cannot be curtailed. It has so held because FP&L purchases directly from a producer so that during transportation, FP&L rather than the pipeline *owns* the gas:

> [W]e do not concur with Cities in curtailing the T-gas under any of the contracts because such gas is not owned by Florida Gas and does not form a part of the system's gas supply from which gas can be allocated to its various customers. . . . Since legal title to the gas is vested in the two power companies prior to its interstate transportation, we do not believe that the *Louisiana Power & Light* and *Lo-Vaca Gathering Company* cases are applicable here and for purposes of Cities' request. *Decision* at 3541, quoting the commission at R366, App. A, p. A-29.

This jurisdictional holding is contrary of the language of the Natural Gas Act and at least three decisions of this Court.[12]

The Fifth Circuit excludes transportation gas from the holding of *Louisiana Power & Light, supra,* greatly narrows *Southland Royalty, supra,* and limits *Lo-Vaca Gathering Co., supra,* to its facts. The apparent adherence by the Fifth Circuit to

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[12]When it certificated the T-3 contract, the Commission held that contract to be non-jurisdictional as to rates. However, it was express that jurisdiction over transportation remains:

"... However, with specific reference to the Examiner's approach [of withholding certification ultil the parties converted the contractual arrangements into a sale for resale arrangement], we point out that if the effect of our decision were to downgrade our responsibility to regulate interstate transportation of natural gas, as compared with our responsibility to regulate sale for resale, we would be writing a priority into the statute not now evident on its face.

"We need not go outside the antecedent case to this one to see how far the first clause of Section 1(b) may be carried toward achieving the substance of a comprehensive regulatory system. Therein the Commission conditioned the grant of certificate upon the filing of new rate schedules, including the transportation rate for carrying gas for FP&L, the elimination of certain cancellation. . . . Nothing in the case would justify our saying the regulatory tool of conditioning a transportation certificate up to and including a control of the field price would not be possible. . . under the first clause of Section 1(b) covering transportation, as under the second clause, covering sales for resale. . . ." *Florida Gas Transmission co.,* 37 F.P.C. 424 at 433-434 (1967, footnote omitted)

its own prior holdings[13] and its "distinguishing" of this Court's decisions interpreting the Natural Gas Act, compels review.

In *Louisiana Power & Light,* 406 U.S. 621 (1972), because of the shortage of natural gas, United Gas Pipeline company could not meet its gas commitments and was forced to curtail deliveries to its customers. Louisiana Power & Light company, a large electric utility, claimed that, since it purchased directly from United rather than through gas distributors, sales by United to it were exempt from the FERC's curtailment jurisdiction. Under the Natural Gas Act, FERC has price regulatory authority over pipeline sales to distributors "for resale", but not over pipeline sales to ultimate consumers. Natural Gas Act, §1(b), 15 U.S.C. §717(b).

Reversing the Fifth Circuit[14], the Supreme Court rejected LP&L's argument holding (406 U.S. at 636):

> In §1(b) of the Act, "[t]hree things and three things only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) *the transportation of natural gas in interstate commerce;* (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale." *Panhandle Eastern Pipeline Co.* v. *Public Service Commission,* 332 U.S. at 516. *Each of these is an*

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[13]*Southland Royalty* v. *FPC* 543 F.2d 1134, (5th Cir. 1976); *Louisiana Power & Light Co.* v. *FPC,* 456 F.2d 326 (5th Cir. 1972); *California* v. *Lo-Vaca Gathering Co.,* 323 F.2d 190 (5th Cir. 1963).

[14]*FPC* v. *Louisiana Power & Light Co., supra,* at 624.

> *independent grant of jurisdiction* and, though the Act's application to "sales" is limited to sales of interstate gas for resale, the Act applies to interstate "transportation.... (footnote omitted, emphasis supplied).

Accord, Sunray Oil Co. v. *FP&L*, 364 U.S. 137, 152-153 (1960); *United Gas Pipe Line* v. *FPC*, 385 U.S. 83, 89 (1966).

In response to LP&L's argument (406 U.S. at 637) "that the proviso in §1(b) creates a complete exemption of direct sales from curtailment regulations." this Court answered (406 U.S. at 638):

> Curtailment regulations are not *rate-setting* regulations but regulations of the "transportation" of natural gas and thus within FPC jurisdiction under the opening sentence of §1(b) that [t]he provisions of this Act shall apply to the transportation of natural gas in interstate commerce....

Thus, this Court has held that the jurisdictional basis for FERC's curtailment jurisdiction is its authority to regulate transportation in interstate commerce under §1(b) of the Act. The gas in *Sebring* is *transported* from gas fields in Texas and Louisiana over 1,000 miles from Florida (*See* R201-202C). Plainly, such gas is subject to the Commission's §1(b) authority over "transportation of natural gas in interstate commerce."[15]

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[15]In pleadings addressed to the Fifth Circuit's request for advice concerning the effect of the Natural Gas Policy Act of 1978, Pub. L. No. 95621, 92 Stat. 3350, the parties agreed that the Act did not expand or contract the curtailment jurisdiction of the Commission over transportation gas, if such jurisdiction exists.

The Fifth Circuit distinguishes Louisiana Power & Light on grounds that the buyer "owns" the gas. Acceptance of this distinction would give parties the ability to contract out of FERC's regulatory jurisdiction, thereby creating the "attractive gap" that this Court has stated many times the Act is intended to avoid. *E.g., Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 682-685 (1954). Moreover, as *Louisiana Power & Light* establishes, unlike its "sales for resale" jurisdiction the commission's jurisdiction over the "transportation of natural gas in interstate commerce" looks towards *function* and not title.

The fifth Circuit also distinguishes *California* v. *Southland Royalty Co.*, 436 U.S. 519, decided last term. In *Southland Royalty*, reversing the Fifth Circuit, this Court held that the commission's regulatory authority over natural gas dedicated to interstate commerce could not be terminated without FERC approval merely because of the termination of private contracts. The essence of *Southland Royalty* is that private contractual language does not control jurisdiction under the Natural Gas Act. Thus, even assuming the Fifth Circuit's distinction of *Louisiana Power & Light* because the buyer "owns" the gas, might have had credibility before *Southland Royalty*, it certainly cannot now[16].

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[16]This Court holds in *Southland Royalty* that mineral fee gas is jurisdictional after the expiration of the mineral fee contract because (436 US at 524):

> The jurisdiction of the Commission *extends to the transportation of natural gas in interstate commerce* or the sale in interstate commerce for resale to consumers. §1(b), 15 U.S.C. §717(b) (1976). Gas which flows across state lines for resale is dedicated to interstate commerce *regardless of the intentions of the producer. California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965). The Court there approved an

(footnote continued on following page)

Finally, the Fifth Circuit refuses to follow *California* v. *Lo-Vaca Gathering Co.*, 379 US. 366 (1965), limiting it to its facts. *Decision* at 3542-3543 App. A, p. A-31—A-32. In *Lo-Vaca*, the question was whether gas sold to a pipeline under a contract that restricted its use to fuel for pipeline compressors was subject to the Commission's rate jurisdiction as a "sale for resale." Natural Gas Act, §1(b), 15 U.S.C. §717(b). Since the gas when sold to the pipeline became part of a commingled gas stream, this Court held such gas to be jurisdictional.

> We said in *Connecticut Co.* v. *Federal Power Commission*, 324 U.S. 515, 529, 'Federal jurisdiction was to follow the flow of electric energy, and engineering and scientific rather than a legalistic or

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(footnote continued from previous page)

> approach to questions of the Commission's jurisdiction *based upon the physical flow of the gas*. . . .

The Fifth Circuit states that "the Southland Court spoke only with regard to the dedication of natural gas to interstate commerce".. *Decision*, at 3544, n. 57, App. A, p.A-34, n.57. However, the issue here is whether the fact that the ultimate user contracts with the producer so as to take title t gas before transportation divests the commission of regulatory authority over the then transported gas. The rationale of *Southland Royalty* that under §1(b) "once gas begins to flow in interstate commerce. . . that flow could not be terminated unless the commission authorized an abandonment of service" reaffirms that jurisdiction attaches when gas is transported in interstate commerce, regardless of the form of the contractual arrangements. "The obligation to serve the interstate market imposed by a certificate of unlimited duration could not be terminated by private contractual arrangements . . ." The Commission reasonably concluded that "under the statute the obligation to continue service attached to the gas, not as a matter of contract but as a matter of law. . . ." *Southland Royalty*, *supra*, 436 U.S. 519.

> governmental, test.' And that is the test we have followed under both the Federal Power Act and the Natural Gas Act, except as Congress itself has substituted a so-called legal standard for the technological one. *Id.*, at 530-531. In *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U.S. 682, 687, we considered the anatomy of the pipeline system to discover the channel of the constant flow; again in *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464, 467; and most recently in *Federal Power Commission* v. *Southern California Edison Co.*, 376 U.S. 205, 209, n.5. The result of our decisions is to make the sale of gas which crosses a state line at any stage of its movement from wellhead to ultimate consumption "in interstate commerce" within the meaning of the Act.
>
> Attempts have been made by one convention or another to convert a local transaction into one of interstate commerce (*Sprout* v. *South Bend*, 277 U.S. 163; *Superior Oil Co.* v. *Mississippi*, 280 U.S. 390) or to make a segment of interstate commerce appear to be only intrastate (*Baltimore & Ohio R. Co.* v. *Settle*, 260 U.S. 166). But those attempts have failed. Similarly, we conclude that when it comes to the question what gas is for "resale" the present contracts should not be able to change the jurisdictional result.

California v. *Lo-Vaca Gathering Co., supra*, 379 U.S. at 369.

While the Fifth Circuit holds that *Lo-Vaca Gathering Co.* no longer has vitality "beyond the facts of this case" (*Decision*, at 3543, App. A,p. A-32), it was cited, quoted with approval and relied upon in *Southland Royalty*,

supra, 436 U.S. at p. 524-525[17].

II. *Certiorari* Is Warranted In View Of The Importance Of This Case For Regulation Under The Natural Gas Act.

Manifestly, this case is important to petitioners and all customers of the Florida Gas Transmission Company pipeline. The large volumes of transportation gas (over 60% at the time of the record, Exhibit 23-A, R1505L), if left uncurtailed, inevitably means increasingly steep curtailments for other customers. However, the decision below has broad impacts beyond the FGT pipeline.

As a means of dealing with the natural gas shortage, FERC has allowed—and even encouraged—many natural gas pipeline users to contract directly with producers. *E.g.,, Consolidated*

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[17]The Fifth Circuit states, *Decision*, at 3544-3545, App. A,A31-A32, that the result in *Lo-Vaca Gathering Co.* stemmed from the "fear that a contrary holding would allow pipelines to discriminate between producers by " 'immuniz[ing] [some] from the reach of Federal regulation,' " 379 U.S. at 370. The result of the decision below not only immunizes more than half the gas flowing through the FGT pipeline from curtailment regulation in times of gas shortage, as well as enormous amounts of produced gas, but it does so regardless of the fact that the transportation gas (lke the compression gas in *Lo-Vaca*) is commingled with the conventional, jurisdictional gas that makes up part of the gas in the Florida gas pipeline. Moreover, since the same amount of gas is delivered to the power companies as they deliver to the pipeline, trans-portation losses, compression gas and gas lost as a result of processing in considerable amounts must be replaced with "jurisdictional" gas.

Edison Gas Co., Docket No. 1679-2, *et al.* ("Order Granting Declaratory Relief", March 16, 1979); F.P.C. Order No. 533, *Policy with Respect to Certification of Pipeline Transportation Agreements*, F.P.C., 54 FPC (August 28, 1975). While petitioners do not have gas volume figures of the amount of transportation gas available to them on a nationwide basis, if the decision below is affirmed, potentially vast amounts of natural gas will be exempted from regulation.

III. *Certiorari* Should Be Granted To Assure Fairness to Florida Cities

As is set forth in the Statement of The Case, p. 7, n.8, *supra*, in *Ft. Pierce Utility Authority of the City of Ft. Pierce* v. *FPC*, 526 F.2d 993 (5th Cir. 1976), the Fifth Circuit decided that gas purchased by Florida Cities directly from the FGT pipeline was subject to curtailment. This decision was made in spite of the fact that Florida Cities were not purchasing "resale" gas, but were purchasing gas pursuant to finally certificated contract sales from the FGT pipeline and, further, in spite of the fact that the gas curtailed from the Florida Cities would have gone solely to serve the needs of other direct sale contract customers. In *Ft. Pierce* the Fifth Circuit rejected the cities' claims as follows: (526 F.2d at 996).

> [i]n *Louisiana Power & Light Co., supra*, the Supreme Court held that the FPC had jurisdiction over"transportation" of gas in interstate commerce. Rejecting the argument that the FPC could only regulate gas for "resale", the Court held that regulation of the transportation gas was an independent jurisdictional grant. While the Commission did not have the power to set rates for interstate gas which is not sold for resale, the Commission does have power over allocations for such gas. (Citations omitted).

A jurisdictional line should not be allowed to survive, which states that because gas sold by a pipeline diretly to customers is "transported", Florida Cities' contract gas is subject to curtailment, but that gas similarly transported to the largest electric electric utilities in Florida is exempt. The differing impacts of the policies announced by the Fifth Circuit in *Sebring Utilities Commission*, freeing all transportation gas from curtailment, and in *Ft. Pierce*, making direct gas sales subject to curtailment even when transferred to other direct sale customers, warrants review.

Finally, Florida Cities believe that justice to petitioners demands that consideration be given to the "practical consequences" of the jurisdictional lines drawn by the Fifth Circuit. Florida Cities have alleged that FP&L's nuclear and gas monopoly threatens their continued existence and that FP&L has used such monopoly power to acquire independent municipal systems. (*E.g.*, R174-176, 186-187, 183-195, 214-215C) Florida Cities have further made allegations connecting the entering into the T-3 arrangements with alleged illegal transactions. Without jurisdiction, the Commission cannot correct the situation. However, in interpreting the Natural Gas Act, the "practical consequences" of jurisdictional exclusions must be considered. *Sunray Oil Co.* v. *FPC*, 364 US 137, 143, 142-147 (1960); *California* v. *Southland Royalty Co.*, 436 US 519, 529-530 (1978).

CONCLUSION

For the foregoing reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

ROBERT A. JABLON
Attorney for:
THE SEBRING UTILITIES COMMISSION, THE FORT PIERCE UTILITY AUTHORITY OF THE CITY OF FORT PIERCE, the GAINESVILLE-ALACHUA COUNTY REGIONAL ELECTRIC WATER & SEWER UTILITIES, and the CITIES OF HOMESTEAD, KISSIMMEE, LAKELAND, STARKE and TALLAHASSEE, FLORIDA

June 18, 1979

Law Offices of:
SPIEGEL & McDIARMID
2600 Virginia Avenue, N.W.
Suite 312
Washington, D.C. 20037

Attorney for Petitioners

APPENDIX

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK
March 20, 1979
MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 77-2911 - SEBRING UTILITIES COMMISION, ET AL.
and vs. FEDERAL ENERGY REGULATORY
No. 77-2972 COMMISSION

Dear Counsel:

Enclosed is a copy of the Court's opinion this day rendered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

Rules 39, 40 and 41, F.R.A.P., govern costs, petitions for rehearing and mandates, respectively. *A petition for rehearing must be filed in the Clerk's Office within 14 days from this date. Placing the petition in the mail on the 14th day will not suffice.*

Local Rule 17 provides that "A motion for a stay of the issuance of a mandate in a *direct criminal appeal* filed under F.R.A.P. Rule 41 shall not be granted simply upon request. Unless the petition sets forth good cause for stay or clearly demonstrates that a substantial question is to be presented to the Supreme Court, the motion shall be denied and the mandate thereafter issued forthwith."

If you are court-appointed counsel, your attention is called to Local Rule 7 which provides: "Appointed counsel shall, in the event of affirmance or other decision adverse to the party

represented, promptly advise him in writing of his right to seek further review by the filing of a petition for writ of certiorari with the Supreme Court, and shall file such petition, if requested by such party in writing to do so."

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By Clare F. Sachs
Deputy Clerk

enc.
cc: TO ALL COUNSEL OF RECORD

P.S.: The judgment entered provides that petitioners pay to intervenors-respondents, Sun Oil Co., Florida Power & Lighht and Amoco, the costs on appeal.

APPENDIX A

SEBRING UTILITIES COMMISSION et al., Petitioners, v. FEDERAL ENERGY REGULATORY COMMISSION, Respondent.

Nos. 77-2911, 77-2972.

United States Court of Appeals,
Fifth Circuit.

March 20, 1979.

The Federal Energy Regulatory Commission found natural gas pipeline operator's gas curtailment plan to be unduly discriminatory and disclaimed jurisdiction to order curtailment of gas operator merely transported. On petitions for review, the Court of Appeals, Brown, Chief Judge, held that: (1) Federal Energy Regulatory Commission, which initially found preference unsupported by reasonable basis for distinction, and then determined that end-use plan would be appropriate to remedy discrimination, correctly applied applicable standard as it interpreted it in finding that pipeline operator's gas curtailment plan was unduly discriminatory; (2) discrimination against direct customers was unnecessary to protect high-priority users; (3) Commission had discretion to impose interim curtailment plan but did not abuse its discretion in not fashioning interim relief in this case, and (4) Commission correctly determined that because pipeline operator never owned gas it merely transported for two utilities, it could not be compelled to allocate such gas to others.

Affirmed.

1. Gas 13(3)

Federal Energy Regulatory Commission, in issuing opinions and orders finding that natural gas pipeline operator's gas curtailment plan was unduly discriminatory and disclaiming

jurisdiction to order curtailment of gas operator merely transported, rendered determinations sufficiently final and definitive to invoke Court of Appeals' jurisdiction.

2. Gas 13(3)

Federal Energy Regulatory Commission, which found preference unsupported by reasonable basis for distinction, and then determined that end-use plan would be appropriate to remedy the discrimination, correctly applied applicable standard as it interpreted it in finding natural gas pipeline operator's gas curtailment plan to be unduly discriminatory. Natural Gas Act, § 4(b), 15 U.S. C.A. § 717c(b).

3. Gas 13(3)

Federal Energy Regulatory Commission, which had already found violation of the Natural Gas Act before it made statement that allegedly shifted burden of proving violation of the Act, did not improperly shift burden of proof in proceedings in which it found that pipeline operator's gas curtailment plan was unduly discriminatory. Natural Gas Act, § 4(b), 15 U.S.C.A. § 717c(b).

4. Gas 13(3)

Discrimination against direct natural gas customers was not necessary to protect high-priority users, nor was pipeline operator required to favor distributor supplied industrials over those that bought directly in order to enable operator and it distributor customers efficiently to offer residential and commercial service, and thus reasonable basis did not support admitted discrimination found in pipeline operator's gas curtailment plan. Natural Gas Act, § 4(b), 15 U.S.C.A. § 717c(b).

5. Gas 13(3)

Until Federal Energy Regulatory Commission, after finding that pipeline operator's gas curtailment plan was unduly discriminatory, held hearing specifically to study possible plans and their effects, assertions of adverse impact on particular distributors was speculation and could not provide support for present plan; Commission would next have to supervise

implementation of new plan and allocate gas in most efficient way possible without arbitrary distinctions within class of customers.

6. Gas 13(3)

By establishing firm and preferred interruptible rate schedules, natural gas pipeline operator, which not only divided group of similarly entitled customers into categories based on rates and dependability of service but also determined when indirect industrials would be served by creating special rate schedule for indirect interruptible customers and making it part of its curtailment priority order, took affirmative part in determining flow of gas to indirect industrials, and thus Federal Energy Regulatory Commission acted reasonably in comparing direct and indirect customers in finding operator's gas curtailment plan to be unduly discriminatory.

7. Gas 13(3)

If Federal Energy Regulatory Commission acted reasonably, in light of basic fact findings and record evidence, in ordering existing natural gas curtailment plan to remain in effect pending hearings, its decision had to be sustained. Natural Gas Act, § 5(a), 15 U.S.C.A. § 717d(a).

8. Gas 2

While Federal Energy Regulatory Commission would have emergency authority, following its lawful finding of a violation of the Natural Gas Act, to prescribe interim relief, it could do so only after a full hearing. Natural Gas Act, §§ 4(b), 5, 15 U.S.C.A. §§ 717c(b), 717d.

9. Gas 13(3)

Federal Energy Regulatory Commission had discretion to determine whether interim relief was necessary following its finding that natural gas pipeline operator's gas curtailment plan was unduly discriminatory. Natural Gas Act, §§ 4(b), 5, 15, U.S.C.A. §§ 717c(b), 717d.

10. Gas 13(3)

Federal Energy Regulatory Commission's oversight function did not compel it to institute interim relief following its finding that gas curtailment plan was unduly discriminatory but rather,that function would arise only with implementation of interim measures. Natural Gas Act, §§ 4(b), 5, 15 U.S.C.A. §§ 717c(b), 717d.

11. Gas 13(3)

Federal Energy Regulatory Commission, which had found that natural gas pipeline operator's gas curtailment plan was unduly discriminatory, which had granted special relief to several parties claiming harm as result of discrimination in allocation, and which by refusing to impose new plan without sufficient record merely determined that known effects of existing plan might be less severe than those of plan prescribed without adequate study, acted reasonably in not immediately ordering implementation of a substitute plan. Natural Gas Act, §§ 4, 5, 15 U.S.C.A. §§ 717c, 717d.

12. Gas 9, 13(3)

Natural gas pipeline operator, which never owned gas it transported for two utilities, stood in position of bailee in relation to utilities and thus could not be compelled to allocate such gas to others in satisfaction of its sales contracts. Natural Gas Act, §§ 1, 1(b), 15 U.S.C.A. §§ 717, 717(b).

13. Gas 13(3)

Federal Energy Regulatory Commission's legal conclusion that it had no jurisdiction over gas transported but not owned by pipeline operator did not constitute factual determination that curtailment of transportation of gas could not result in greater availability to some higher-priority users, nor did it implicitly improve undue discrimination in allocation of supplies.

14. Gas 1

Although Federal Energy Regulatory Commission has responsibility to consider competitive impact in matters properly before it, alleged anticompetitive effect, in and of itself, does not create jurisdiction over natural gas.

Petitions for review of orders of the Federal Power Commission and the Federal Energy Regulatory Commission.

Before BROWN, Chief Judge, GODBOLD and RONEY, Circuit Judges.

BROWN, Chief Judge:

The Federal Energy Regulatory Commission (FERC) issued several opinions and orders [1] in which it (1) found Florida Gas Transmission Company's (FGT) gas curtailment plan to be unduly discriminatory and (2) disclaimed jurisdiction to order curtailment of gas FGT merely transprts. In this case, several parties—[2] aligning themselves in different camps on different

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[1]Opinion No. 807, issued June 24, 1977; Opinion No. 807-A, issued September 22, 1977; Order Denying Rehearing in Docket No. RP75 79, issued November 21, 1977; Order Dismissing Petition and Complaint, Granting Motions to File Response, and Permitting Interventions in Docket No. CP77-147, issued August 3, 1977; and Order Denying Applications for Rehearing and Denying in Part Motion for Clarification in Docket No. CP77-147, issued September 30, 1977.

[2]For ease of identification, we denominate the three issues (which will be explained more fully in the test of the opinion) as (i) undue discrimination, (ii) immediate implementation, and (iii) transportation gas.

(a) Attacking the Commission's finding of undue discrimination

issues—seek review of those opinions. While some argue that substantial evidence does not support the Commission's holdings, others insist that the Commission has erred in not immediately implementing its orders. Finding that it has struck a proper balance, we affirm the Commission on all points.

FGT operates a natural gas pipeline that serves several areas of Florida. It sells both to distributors (who in turn sell to residential, commercial, and industrial customers) and directly to

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are City Gas of Florida, Southern Gas, Gainesville Gas, Gulf Natural Gas, Lake Worth Utilities, and Utilities Commission, City of New Smyrna Beach, Florida.

(b) Only Gardinier challenges the Commission's failure to require immediate implementation of an interim plan to remedy the "undue discrimination." City Gas, Lake Worth Utilities, Peoples Gas System, Gainesville Gas Company, Southern Gas Company, Gulf Natural Gas Corporation, and Utilities Commission, City of New Smyrna Beach, Florida, all support the Commission on that point.

(c) Regarding the issue of transportation gas — that is, transportation of gas owned by FP and FPL — Abitibi Corporation, Sebring Utilities Commission, Fort Pierce Utilities Authority, Gainesville-Alachua County Regional Water, Electric & Sewer Utilities, Lake Worth Utilities, Utilities Commission, City of New Smyrna Beach, Florida, and Cities of Homestead, Kissimmee, Lakeland, Starke and Tallahassee (Florida Cities) challenge the Commission's holding. Sun Oil Company, Amoco Production Company, and Florida Power and Light Company, on the other hand, all intervene in support of the Commission's decision.

Since some of the parties change sides on the issues, we asked that they organize their briefs and arguments according to issues rather than parties. We similarly structure the opinion. As such, the case proved the value of our Local Rule 24(g), which allows the Court to all a prehearing conference. The conference held in this case was conducted by a member of this panel and was attended by all counsel.

some large industrial concerns.[3] It also transports gas for two major electric generating companies, Florida Power Corporation (FP) and Florida Power and Light (FPL), both of which buy large amounts of gas in Texas.[4]

FGT has fixed various rate schedules and degrees of reliability of service in its sales contracts. Wholesale distributors may purchase gas under the G schedule, which provides firm general service, and the I schedule,[5] which offers gas for resale to preferred interruptible resale customers. Direct customers may also purchase either interruptible[6] or firm service.[7] Under FGT's

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[3]FGT began its pipeline operations pursuant to Commission authorization issued December 29, 1956. At that time, the Commission recognized that because of Florida's mild weather and relatively low level of industrial development, small load requirements would make it difficult for the pipeline to operate efficiently. It therefore certificated that pipeline's transportation of large quantities of gas purchased by FP and FPL for ultimate use as boiler fuel in generating electricity. (FP had contracted with Sun Oil Company and Pure Oil Company to purchase gas from Southern Louisiana reserves. FPL had contracted with Sun to purchase gas from South Texas fields. Both power companies had contracted with FGT to transport this gas).

[4]FGT transports this gas under transportation rate schedules T - 1, T - 2, and T - 3.

[5]Only customers that also buy schedule G gas may buy schedule I gas. Schedule I gas costs less than gas sold to direct industrial customers.

[6]There are two classes of interruptible service: primary and preferred. During the years 1962 through 1971, FGT served another class of customers - intermediate interuptible. According to petitioners' brief on the undue discrimination issue, there have been no customers in this class since 1971.

In 1962 FGT adopted a policy of making industrial sales through distribution companies whenever possible. If a potential customer were

tariff,[8] in case of gas shortages, it will curtail deliveries to its customers in the following order:[9](1) primary interruptible direct customer, (2) preferred interruptible direct, (3) distributors purchasing under schedule I, (4) firm direct industrial, (5) distributors purchasing under schedule G (for resale to firm customers).

Prior to 1972, FGT contemplated — and experienced —

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located in an area served by one of FGT's wholesale customers, it would refer the new company to the distributor. If not, FGT would sell directly. Thus, geographical location of the industrial customers determined whether they would buy directly or indirectly.

[7]More specifically, FGT offers three broad classes of service:

a. Transportation for Florida Power and FPL of gas purchased by the utilities in the field.

b. Wholesales to local distributors for resale. These fall into two categories: Firm service — under rate schedule G. This resale firm service is basically to residential and small commercial users. (R. 1688-90, 537). Interruptible service — under rate schedule I. This resale interruptible service is generally to industrial and small commercial users. (R. 1691-94, 1515-28).

c. Sales directly to the ultmate consumer. Firm service — very small volumes of gas are sold directly on a firm basis (see R. 1504 — 05, 1511). Interruptible service — direct sales, primarily to industrial customers (R. 1512-13).

[8]FGT filed its current curtailment tariff in response to the Commission's order No. 431. The Commission took no action with rspect to the filing.

[9]As the D.C. Circuit explained in *North Carolina* v. *FERC*, 1978, 190 U.S. App. D.C. 22, 26, 584 F.2d 1003, 1007,

[w]hen a pipeline company's natural gas supplies become inadequate to meet contractural commitments to customers, there must be provision—through a curtailment plan—for apportioning the diminishing gas supply among the customers.

only relatively short term curtailments of its interruptible customers. Because it did not foresee any gas supply shortage, it expected to deliver substantially all of its contract volumes. In 1973, however, FGT curtailed its direct interruptible customers twice as many days as it had in 1972. In 1974, that figure almost doubled again.[10]

On March 21, 1975 Lehigh Portland Cement Company,[11] a direct interruptible customer of FGT, filed a complaint under Section 5(a) of the Natural Gas Act [12] (the Act), asserting that

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[10]The actual figurs were as follows:

1972	60.6. days
1973	120 days
1974	211.6 days
1975	287.5 days (estimated)

[11]Lehigh is now Rinker Cement Company.

[12]15 U.S.C.A. § 717 d(a):

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company;but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

FGT's curtailment plan unlawfully discriminates against direct industrials in favor of indirect industrials purchasing from distributors. It argued that because the plan curtails gas without regard to end use,[13] it should be found unjust, unreasonable, unduly discriminatory, and preferential. The Commission set the matter for formal hearing on its own motion, and on August 5, 1976, the Presiding Administrative Law Judge issued a decision dismissing the complaint.

The Commission, however, reversed the ALJ in it Opinion No. 807. Announcing that "those who are similarly entitled must be treated equally regardless of their ability to survive otherwise,"

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[13]*See North Carolina* v. *FERC*, 1978, 190 U.S. App. D.C. 22, 26, 584 F.2d 1003, 1007:

By the "end-use" approach various uses of natural gas are ranked according to their essentiality or desirability, and allocation is first made to the highest priority use, then if supplies are sufficient, to the next highest use, and so on down the line until supplies are exhausted. Most pipeline customers are distributor companies which resell the gas to ultimate consumers; therefore, under the end-use approach, the extent to which a pipeline's distributor customers are curtailed depends on the "mix" of each distributor's own customers. Distributors who have a large percentage of high priority customers theoretically will not be curtailed as deeply as those who have a small percentage of such customers,and distributors who have a large percentage of low priority customers will be curtailed more sharply than those who have a small percentage of such customers. The object of an "end-use" plan is to ensure that higher priority uses are completely supplied before lower priority uses are served.

In Order No. 467, 49 FPC 85 (1973), as modified by Order No. 467-B, 49 FPC 583 (1973), the Commission announced a policy of favoring curtailment priorities based on the purposes for which the gas would be used. These orders will be referred to collectively as Order No. 467 unless otherwise necessary to clarity.

it found FGT's plan unduly discriminatory and ordered it to file a new plan that would provide equal treatment of direct and indirect customers who make similar use of the gas.[14] The Commission further ordered that FP and FPL be joined as parties so that all gas transported by FGT could be made part of the new plan.

After several parties petitioned for rehearing, the Commission issued Opinion No. 807-A, which affirmed its previous holding that FGT's curtailment plan was no longer just and reasonable, but rescinded its order that the pipeline file a new plan. It instead determined that the existing curtailment should remain in effect until the § 5 hearing was completed or pending further Commission order. In addition, 807-A summarily reversed the Commission's prior decision to include the FP and FPL transportation gas in any new plan.[15] Numerous interested parties filed petitions for review in this Court.[16]

On January 18, 1977, in an independent proceeding, the Fort Pierce Utilities Authority of the City of Fort Pierce filed a petition and complaint. It requested (1) that the Commission order curtailments of the transportation gas on FGT's system, and (2) that the Commission condition further transportation upon FGT's curtailing the transportation volumes proportionately with those to which preferred interruptible

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[14]In connection with this order, the Commission determined that a hearing should be held on a new curtailment plan. The ALJ had phased the evidentiary hearing so that if he determined in Phase I that the existing plan were unduly discriminatory, he would hear evidence on a new plan in Phase II. Because of his initial determination, the record contained no evidence on a new plan.

[15]On November 21, 1977 the Commission denied petitions for rehearing the Opinion No. 807-A.

[16]These were filed as case No. 77-2911.

customers would be otherwise entitled.[17] The Commission issued an order dismissing the claim on August 3, 1977, and denied rehearing on September 30, 1977. In both orders it found that it lacked the authority to grant the requested relief. It reasoned that because FGT does not own the transportation gas, it cannot allocate it. Moreover, legal title passes before the gas flows interstate. Again several parties petitioned this Court for review of the Commission orders.[18]

Undue Discrimination[19]

[1] In attacking the Commission's finding, that FGT's plan is unduly discriminatory, petitioners[20] first contend that FERC evaluated FGT's curtailment plan against an incorrect standard, and that it improperly shifted the burden of proof in its proceedings. They cite the Commission's statement in Opinion

[17]Petitioners were not complaining that FGT's pipeline had inadequate capacity to carry gas for all of its customers. They instead wanted the Commission to order reallocation of portions of FP's and FPL's gs to FGT's sales customers.

[18]These were filed as Case No. 77-2972. On March 20, 1978, this Court consolidated this case and No. 77-2911.

[19]Before addressing the issues, we wish to point out that we find each reviewable. At our prehearing conference, held March 3, 1978, see note 2, supra, we requested that the parties argue in their briefs the question whether each issue is reviewable. They ably complied with our request, thus aiding us in reaching the conclusion that each is ripe for review. Regarding each question, the Commission has rendered a determination sufficiently final and definitive to invoke this Court's jurisdiction. See *Port of Boston Marine Terminal Ass'n* v. *Raderiakliebolaget Transatlantic*, 1970, 400 U.S. 62, 71, 91 S.Ct. 203, 209, 27 L.Ed.2d 203, 210. See also *Magnolia Petroleum Co.* v. *FPC*, 5 Cir., 1956, 236 F.2d 785, 793 (Brown, Judge, dissenting).

[20]See note 2(a), supra.

807, that "there is a heavy burden to show that a non-end-use plan is superior," and contend that it demonstrates that the Commission elevated its statement of policy—as announced in Order 467, favoring end-use considerations[21] — to a legal presumption. Moreover, it compelled the supporters of the status quo to prove that the plan met the standard rather than imposing the burden of proving violation on those seeking to change the curtailment.[22] Such arbitrary action,[23] they insist, merits reversal of the Commission's decision.

[21]Petitioners point out that, according to the Court of Appeals for the District of Columbia Circuit, the FERC General Statement of Policy does not carry the force of law. It "is merely an announcement of a policy which the agency hopes to implement in future rulemakings or adjudications." *Pacific Gas & Electric Co.* v. *FPC*, 1974, 164 U.S.App.D.C. 371, 376, 506 F.2d 33, 38.

[22]Citing our prior opinions in *Louisiana* v. *FPC*, 5 Cir., 1974, 503 F.2d 844, 866, and *Louisiana Power and Light* v. *FPC*, 5 Cir., 1976, 526 F.2d 898, 900-08, petitioners emphasize that those wishing to change an existing plan must shoulder the burden of proving it unjust and unreasonable.

[23]Petitioners attempt to highlight this alleged arbitrarines by citing the Commission's "Order Granting Motion to Dismiss Complaint and Rquest for Order to Show Cause and Permitting Interventions," issued May 12, 1977, in *General Motors Corp.* v. *Natural Gas Pipeline Co. of America*, Docket No. RP76-86 ("Order No 467 . . .was not intended to initiate a proceeding or to provide a binding rule without further proceedings directed toward curtailment problems of specific pipelines.") Opinions 807 and 807-A, they argue, are clearly inconsistent with *General Motors*.

FERC, however, distinguishes *General Motors* on the ground that the issue of undue discrimination had not been raised in those proceedings. The Commission dismissed the complaint primarily because "General Motors' complaint fail[ed] to disclose the presence of any direct, immediate injury that General Motors can sustain from the continuance of Natural's currently effective curtailment program."

[2] We cannot agree. We think the Commission correctly applied the § 4(b) standard as it interpreted it.[24] An examination of Opinions 807 and 807-A reveals that the Commission initially found a preference unsupported by a reasonable basis for distinction, and then determined that an end-use plan would be appropriate for remedying the discrimination.[25] In 807 it examined the similarities between two cement plants — one an indiret customer of FGT, the other a direct — and found no statutorily acceptable reason for the indirect customer's receiving almost twice as much FGT gas as the direct.[26] It made this finding before discussing "the necessity for an end use plan."[27] In 807-A the Commission apparently trying to clear up any confusion caused by Opinion 807, carefully delineated its two findings:

. . . . The Commission said [(1)] that the [FGT curtailment plan] discriminates against its direct sale customers in favor of

[24]We recognize that much of the commission's language, especially in opinion 807, reflects the Commission's preference for an end-use plan. We think, however, that one statement clarified FERC's approach:

In the opinion of the Commission it is not necessary to show higher overall costs of doing business or a competitive disadvantage in order to prove undue discrimination or preference n favor of others. The essence of the principle is that those who are similarly entitled must be treated equally regardless of their ability to survive otherwise. Thus it appears that the Commission deems § 4(b) to be calling for equal treatment of those who use gas (or who are entitled to it) in similar ways. It is enforcing its interpretation of the statutory standard, and we cannot say that it interpretation is unreasonable. Order 467 merely represents the Commission's view of a way to enforce that standard.

[25]This Court has recognized that end-use priorities constitute a "most appropriate consideration for purposes of a curtailment plan." *Louisiana* v. *FPC*, 5 Cir., 1974, 503 F. 2d 844, 858.

[26]Op. 807, slip op. at 7-9.

[27]Op. 807, slip op. at 11.

indirect customers, who receive gas on resale from distributing companies, and [(2)] that FGT must file a curtailment plan based on end-use of the gas providing equal treatment for direct and indirect customers making similar use of the gas.

[3] Regarding the contention that the above-quoted sentence shows that the Commission shifted the burden of proving violation of the Act, we first emphasize that it made this statement while discussing the sort of plan FGT should submit in place of the present one. It had already found a violation of the Act. Next, we point to the Commission's answer to this very claim in Opinion 807-A, in which it said that [w]e recognize that the complainant has the burden of proof and that Order No. 467B merely states our policy. We think, however, that the complainants have met their burden of showing that while they operate in like manner as the indirect customers they receive a smaller share of gas. Op. 807-A, slip op. at 7, emphasis added.

[4] Petitioners level their second attack against Opinions 807 and 807-A by arguing that, contrary to the Commissin's findings, a reasonable basis did support the admitted discrimination.[28] They point to the history of the pipeline and the unique economic difficulties involved in supplying gas to Florida, contending that

[28]While admitting that the plan does discriminate, petitioners correctly point out that more is required to violate the Act. Section 4(b) prohibits undue discrimination, preference without a reasonable basis:

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.
15 U.S.C.A. § 717c(b).

these factors militate against a change in the present system.

Because Florida experiences generally mild weather conditions with occasional drastic changes in temperature, temperature sensitive loads may swing annually as much as about 800%. In order to serve these loads efficiently, therefore, FGT distributors had to sell to customers who would accept interruptible service. In other words, in order to maintain dependable deliveries to those serving residential and other high priority users, the pipeline had to develop an industrial market that would use large amounts of availalble gas but could be curtailed during gas shortages.[29] Thus, say petitioners, the plan does work to protect high priority users.

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[29]According to petitioners, FGT has worked to further this policy by its practice of encouraging industrial sales through wholesale distributors. If they experience curtailments of supply, these distributors will then pass on the curtailments to their resale industrial customers before their resale residential customers. In the meantime, FGT's direct industrial customers, by suffering the greatest curtailments, support the establishment of the resale markets. Theoretically, then, as resale markets grow, direct markets will be curtailed out of existence. (The Commission denies that phase out was ever a purpose of the plan. It instead contends that FGT intended to serve all loads, direct and indirect).

Petitioners argue that the direct customers, by paying a lower price for their gas, bargained for this greater degree of curtailment. We, however, agree with the Commission's observation, in Opinion 807, that [e]ven if the direct sales customers could be found to have entered into contracts with FGT directly in order to obtain certain advantages such as a lower price for gas or the option to use oil, which was then less expensive than gas, circumstances changed radically and what may once have been a non-discriminatory contract would have becme a discriminatory one.

At the time the direct customers negotiated their contracts, they and FGT contemplated only short curtailments, mostly related to

While we recongnize - as does the Commission — that the present plan may favor some high priority users,[30] we do not agree that discrimination against direct customers is necessary to secure this protection.[31] And although we accept the contention

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pipeline capacity. As the demand for gas grew, the pipeline would periodically expand capacity. In the context of a severe gas shortage and the resultant need rationally to allocate a disappearing commodity, the parties (and the Commission) must consider different factors than they would in allocating the inconvenience that accompanies periodic expansion of facilities. *See Consolidated Edison Co.* v. *FPC*, 1975, 168 U.S.App.D.C. 92, 102, 512 F.2d 1332, 1342 ("The shortage itself appears to have come with a suddenness and severity which the agency failed to anticipate. With it, came the recognition that in the absence of some guidance from the Commission, the allocation of scarce supplies might be too much governed by concentrated economic interests rather than the public interest genrally.") *See also American Smelting & Refining Co.* v. *FPC*, 1974, 161 U.S.App.D.C. 6, 15, 494 F.2d 925, 934, *cert. denied*, 419 U.S. 882, 95 S.Ct. 148, L.Ed.2d 122, in which the court observed that

[t]he short answer to this argument [that a Commission-imposed curtailment system disrupts contractual relations of the parties] is that the Commission is not bound by agreements among parties subject to its jurisdiction. Section 5(a) of the Act gives the Commissioner authority to override discriminatory contra tural arrangements . . . to the extent that the illegal curtailment plan was reflected in customer contracts, such contracts were also superseded by the Commission's orders.

[30]We must again emphasize that the Commission did not make its finding of undue discrimination on the ground that FGT did not employ an end-use plan. It instead found that an end-use plan would remedy the unjustified discrimination.

[31]Petitioners argue that the Commission recognized the reasonableness of the existing plan in Opinion No. 611, in which it rejected the City of Gainesville's (a direct industrial user) claim that "the same priority of service should be assigned to both resale I gas and the

that industrial loads may be necessary to enable the pipeline and its distributor-customers efficiently to offer residential and commercial service, we cannot make the leap necessary to conclude that this necessity requires favoring distributor-supplied industrials over those who buy directly.

[5] Petitioners offer the argument that many of the distributors would face bankruptcy if they were curtailed to the extent that their industrial customers received gas supplies on an equal basis with direct industrials. Here, again, we agree with the Commission that there is now insufficient basis for such a contention. Until the FERC holds hearings specifically to study possible plans and their effects, assertions of adverse impact on

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direct sale preferred interruptible gas." Florida Gas Transmission Co., Opin. No. 611, 47 FPC 341, 380 (1972). (The Commission denied rehearing of Opinion 611, by order issued January 19, 1973, after having issued Order 467).

The Commission distinguishes Opinion 611 by pointing out that Gainesville had presented its discrimination claim in terms of a rate differential rather than a disparity of curtailment. It had complained that because it had to pay more than the price of schedule I gas, it should enjoy curtailment priority at least equal with that of the resale industrials. The Commission, however, explained that

[t]he I service is different from the direct preferred interruptible service. To qualify for it the distributor must purchase higher priced G service whereas the direct interruptible customers need not do so. Furthermore, the I rate has been held low to make it competitive with other fuels * * * We conclude, therefore, that the tariff should not be changed with respect to priorities on curtailment at this time.

Moreover, as of the date of Opinion 611, Gainesville had experienced almost no curtailment of gas supplies. Cf. note 10, *supra*.

particular distributors is speculation.[32] Moreover to the limited extent that the record reflects the effect of the Commission's decision, it indicates that a 467 priority plan would provide the over seventy-five percent of the distributors of FGT's system more gas than they would have under the present tariff.[33]

[6] Petitioners finally contend that Opinions 807 and 807-A are unlawful because direct and indirect customers — between which the Commission found undue discrimination — are not in the same class for the purposes of the Act. They are thus not legally comparable. Labeling the indirect industrials "non-customers," petitioners contend that the Commission should compare curtailment oly between "customers" — i.e., direct

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[32]We find nothing in the record that indicates (as petitioners appear to imply) that residential consumers will no longer receive gas if resale industrials begin to experience curtailments on an equal basis with direct industrials. And absent some evidence that the present plan actually does provide greater protection to high-priority users, discrimination based on that premise cannot be justified. *See North Carolina* v. *FERC*, *supra*, 190 U.S. App.D.C. at 31, 584 F.2d at 1012.

We also think that the thrust of the petitioners' argument aims at the unknown but impending future curtailment system rather than at the Commission's basic finding. In asserting their position, they have forgotten that the Commission must consider the impact that a plan actually does or will have on ultimate consumers. At this point the Commission has merely found that "economic factors have a diverse impact on [FGT's] customers, and [petitioners] offer no justification for disparate treatment of direct and indirect customers." It will next supervise implementation of a new plan that allocates the gas in the most efficient way possible but without arbitrary distinctions within a class of customers. *See id.*, 190 U.S. App.D.C. at 31, 33-35, 584 F.2d at 1012, 1014 - 16.

[33]R. at 1509-10. This figure assumes curtailment based on the estimated 1975 curtailment rates.

industrials and wholesale distributors. Since the distributors determine the extent of curtailment after they receive the gas, FGT's tariff does not determine the extent of curtailment to resale users.

We have no trouble dispensing with these contentions. First of all, the Supreme Court has recognized Commission authority over curtailments of both direct and indirect customers. *FPC* v. *Louisiana Power and Light Co.*, 1972, 406 U.S. 621, 92 S.Ct. 1827, 32 L.Ed.2d 369. FGT's particular system of distribution has divided a group of similarly entitled[34] consumers into categories based on rates and dependability of service. It has also determined when indirect industrials will be served by creating a special rate schedule for indirect interrruptible customers (most of which are industrial) and making it part of its curtailment priority order. Thus, by establishing the schedule I and G rates, the pipeline took an affirmative part in determining the flow of gas to indirect industrials. In such a situation, we cannot say that the Commission was unreasonable in making the comparison it did.[35]

Immediate Implementation

Gardinier, Inc., a direct interruptible customer of FGT, also seeks review of Opinions 807 and 807-A, but with a different approach. While supporting the Commission's finding of an undue preference, it challenges the FERC's failure immediately to implement a substitute plan. It argues that § 5 mandates such

[34]We use "similarly entitled" to mean those who enjoy similar use priority.

[35]We also agree with the Commission that a more appropriate comparison in the curtailment context is between ultimate consumers. This is especially true in light of the Commission's duty to protect the public interest in the allocation of scarce supplies of natural gas.

immediate action and insists that both §§ 5 and 4 offer the procedures. We will address the § 5 and § 4 arguments separately.

[7] Before going further, however, we must point out that a "reasonableness" standard governs our consideration of this issue. If the Commission has acted reasonably — in light of the basic fact findings and record evidence — in ordering the existing plan to remain in effect pending § 5 hearings,[36] we must sustain its decision. *American Smelting, noted supra*, 161 U.S.App.D.C. at 22, 494 F.2d at 941.

[8] Section 5's mechanism for remedying discrimination in allocation of gas begins with the Commission's lawfully finding a § 4(b) violation. Upon such determination, the Commission will then impose its own plan, but only after a hearing and an administrative determination that the plan implemented is just and reasonable. See *Southern Natural Gas* v. *FPC*, 5 Cir., 1977, 547 F.2d 826, 832. While, as Gardinier asserts, the Commission would have emergency authority — even when conducting a § 5 hearing — to prescribe an interim plan,[37] it can do so only after a full hearing.[38]

[9] This hearing requirement, along with the lack of record evidence on various curtailment plans, marks the source of the Commission's reluctance to impose an interim plan. Since the

[36]See note 14, *supra*.

[37]*FPC* v. *Louisiana Power and Light Co.*, *supra* 406 U.S. at 644, n. 18, 92 S.Ct. 1827, n. 18.

[38]*American Smelting*, *supra* 161 U.S.App.D.C. at 14, 494 F.2d at 933. The Court's elaboration on this point is relevant here:

Like any order issued pursuant to section 5(a), an interim order can only issue after full hearing and must include a statement of reasons based on findings of fact which are supported by substantial evidence in the record. No emergency can excuse these procedural requirements.

structure of the fact finding proceedings before the ALJ effectively precluded presentation of data regarding possible alternative curtailment plans, the Commission maintains that it must develop a record before it can reasonably enforce compliance with any new system, end-use or otherwise. Speedy action without the benefit of data on costs and effects, says the Commission, might result in the implementation of a plan more discriminatory than that now in existence.

The FERC agrees that it must remedy the discrimination (and denies petitioner's assertion that it is witholding relief). According to the Commission, the relief is forthcoming, but in accordance with the procedural requirements of § 5.

Gardinier asserts that the record does contain sufficient evidence to support temporary relief[39] and insists that § 5 absolutely requires such immediate action.[40] It points to

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[39] *See Consolidated Edison Co.* v. *FPC*, 1974, 167 U.S.App.D.C. 134, 144, 511 F.2d 372, 382, in which the court found that in view of emergency conditions existing at the time, "the justificiations offerred by the Commission in support neet not be as elaborate as required for the implementation of a permanent curtailment plan."

[40] In petitioners's reply brief it argues that the word "thereafter" in § 5(a) referes back to the word "whenever." ["Whenever the Commission, after a hearing . . . shall find that any rate . . . is unjust, unreasonable . . . the Commission shall determine the just and reasonable rate . . . to be thereafter observed and in force, and shall fix the same by order * * *."] "Whenever" marks the triggering event and "thereafter" prescribes the time for remedy. Stating that "[n]owhere is there any support for construing the word to mean 'sometime in the indefinite future,' " petitioner asserts that "thereafter" necessarily implies *immediately*. Even assuming petitioner's interpretation of "thereafter" to be correct, we cannot buy this argument. According to the clear language of the statute, "thereafter" refers back to the Commission's implementation of a remedy. Thus the word itself imposes no burden upon the Commission to institute an interim plan.

decisions of several courts that have recognized the Commission's authority to issue interim curtailment orders.[41] We do not think though, that these acknowledgments of authority necessarily mean that the Commission has an affirmative duty to fashion interim relief in all cases. Indeed, the opinions petitioner cites all recognize the Commission's discretion in determining whether such relief is necessary.[42]

The *Consolidated Edison* cases,[43] cited by Gardinier, do not support its position. They instead reinforce our finding that the Commission may formulate an interim plan under § 5. In *Consolidated Edison I* the District of Columbia Circuit found that a 467-type curtailment plan — submitted by Transcontinental Pipeline (Transco) — would have an extremely harsh impact on certain customers. It therefore temporarily replaced the submission with a settlement agreement, previously rejected by the Commission, negotiated between Transco and its customers. After having discussed the reasons for its action, the court added that "[o]ur present action . . . in no way precludes the Commission from modifying the settlement or taking other action based on the information which it has generated . . . . the Commission asserts, and we agree, that it has residual emergency powers to impose an interim plan where there is no alternative."

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[41] *See FPC* v. *Louisiana Power & Light Co., supra.*

[42] *See, e.g., American Smelting, supra,* in which the court stated that when the Commission is considering interim relief it must make two determinations:
(1) whether an interim curtailment order is necessary and (2) whether a particular interim plan is just and reasonable.
(Emphasis added).

[43] *Consolidated Edison Co.* v. *FPC*, 1974, 167 U.S.App.D.C. 134, 511 F.2d 372 (*Consolidated Edison I*); *Consolidated Edison Co.* v. *FPC*, 1975, 168 U.S.App.D.C. 92, 512 F.2d 1332 (*Consolidated Edison II*).

Warning that "[s]uch powers must be carefully confined," it nevertheless found that the Commission — faced with an emergency shortage of gas and little possibility of formulating a permanent curtailment plan before winter — could effect such a plan.[44] By acknowledging the Commission's authority to act, while at the same time providing for the possibility that it would not institute interim measures, the court clearly recognized the Commission's decretion to fashion such relief.

[10] Similarly, in *Consolidated Edison II* the court reiterated its statement that "the FPC might issue interim curtailment orders based on evidence compiled in hearings on a permanent plan." (Emphasis added). It cautioned, however, that once the Commission instituted such relief, it "has a responsibility to monitor whatever interim plan may be in effect pending a final decision, and to make such adjustments as may appear warranted. * * * Our decision today places heavy reliance on the Commission's conscientious discharge of its oversight function." 168 U.S.App.D.C. at 103, 512 F.2d at 1343. Thus, contrary to Gardinier's assertion that the Commission's oversight function compels it to institute interim relief, that function arises with the implementation of interim measures.

[11] Having found that the Commission indeed has discretion to impose an interim curtailment plan, we must now consider the question whether it has reasonably exercised this discretion. Gardinier, maintaining that the Commission has been

[44]The court found that the procedural requirements of § 5 would be satisfied since a hearing on the relevant issues had been completed. ("We think that the record compiled provides an adequate basis on which the Commission, under the conditions which now confront Transco's customers, could issue interim orders . . . ") 167 U.S. APP. D.C. at 144, 511 F.2d at 382.

unreasonable, attacks its stated reasons for not fashioning interim relief as "frivolous." The first of these reasons is the Commission's fear that a plan submitted in accordance with Opinion 807's order would be construed as a § 4 filing. Desiring to avoid the summary procedures involved with such filings,[45] the Commission ordered that FGT submit a "case in chief" rather than an actual curtailment plan.

Gardinier criticizes this action, accusing the Commission of suffering from a basic misunderstanding of § 5. A plan so ordered, according to petitioner, would be a § 5 compliance filing. We agree that only § 5 allows the Commission to impose a particular plan. *Southern Natural Gas Co.* v. *FPC*, 5 Cir., 1977, 547 F.2d 826, 832. We further acknowledge that if a pipeline files under coercion rather than voluntarily, the plan is invalid unless § 5 procedural requirements have been satisfied. *Consolidated Edison I, supra.*

But we fail to see how this renders the Commission's action unreasonable. Even under the 807 order, the Commission was not going to put FGT's proposal immediately into effect. It was going to conduct extensive hearings and supervise a detailed study in order to produce a just and reasonable final product. Assuming without deciding[46] that the Commission misapprehended the effect of an ordered filing, we nevertheless find that that mistake would not necessarily have prejudiced petitioner. There is no indiciation that FGT's proposal would have taken effect before the plan that FGT and the Commission will ultimately produce.

The Commission also stated that it wished to avoid causing

[45]See discussion accompanying note 48, *infra.*

[46]Such a finding would require a factual determination that the pipeline was not filing voluntarily.

undue harm to schedule I customers of FGT-supplied distributors:

To impose a 467-B plan on their system and its distributors with their heavy dependence on the industrial load without adequate consideration of its effects at a hearing would in our opinion be reckless. Likewise we can not properly take the half-step of requiring equal treatment of the direct preferred interruptible customers and the I customers because the record is not sufficient on the entitlements of the various customers or the impact on any but a few. Therefore, we shall not prescribe an interim plan at this time but will allow the present plan to remain in effect pending further Commission order.

Gardinier attacks this reasoning with the observation that all end-use plans, however implemented, necessarily curtail low priority users most heavily. It further contends that the Commission's refusal immediately to impose such a plan is inconsistent with its stated policy of ensuring priority of delivery to residential and commercial consumers during gas shortages.

If the Commission were truly concerned about possible economic harm to particular customers, continues Gardinier, it would have ordered expedited proceedings or have prescribed a plan with an invitation to seek special relief. Despite petitioner's concerns, we think that the Commission acted reasonably. The District of Columbia Circuit has recognized that a 467-type curtailment can have an unduly harsh impact on certain customers.[47] And the Commission has granted special relief to several parties claiming harm as a result of discrimination in allocation. By refusing to impose such a new plan without a sufficient record, the Commission is not shirking its § 5 remedial

[47] *Consolidated Edison I, supra.*

duties. It has merely determined that the (known) effects of the existing plan may be less severe than those of a plan prescribed without adequate study.

We now turn to Gardinier's claim that the Commission should have required the pipeline to shoulder it § 4[48] burden of

[48] Section 4(e), 15 U.S.C.A. § 717C(e):

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any

unilaterally filing a proposed curtailment system. In our discussion of § 5 remedial procedurs, we explained one of our objections to this position. If FGT were persuasively to claim that it had filed only under coercion from the Commission, and § 5 procedures had not been observed, the filings would be invalid.

If, on the other hand, FGT voluntarily filed, only *guided* by the 807 order, the § 4 mechanism would be set in motion. As we explained in *Southern Natural Gas Co., supra* at 832,

[u]nder section 4, a regulatee can file its own plan, and, after 30 days, that plan will take effect unless the FPC suspends its operation. In no event can the FPC suspend a proffered plan for longer than five months.

Courts have recognized that § 4 allows "greater celerity and flexibility," *Southern Natural Gas Co., supra* at 832, and for that reason have often deemed it appropriate to proceed thereunder in emergency situations. *FPC* v. *Louisiana Power and Light Co., supra.* But as we have observed, the authority to do so is discretionary. The Commission stated specifically its reasons for not wanting any plan to become effective before the completion of a hearing and Commission action. Since we have found its rationale reasonably adequate in our discussion of § 5, we find it unnecessary to review it further. We thus reject Gardinier's claim.

Transportation Gas

[12] We finally turn to the contention of several of the

hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending beforer it an decide the same as speedily as possible.

petitioners[49] that the Commission should order curtailment of the FP and FPL-owned gas that FGT merely transports.[50] When considering this claim in the Fort Pierce proceeding, the Commission said

[w]e do not concur with Cities in curtailing the T-gas under any of the contracts becuse such gas is not owned by Florida Gas and does not form a part of the system's gas supply from which gas can be allocated to its various customers.

Since legal title to the gas has vested in the two power companies prior to its interstate transportation, we do not believe that the *Louisiana Power and Light* and *Lo-Vaca Gathering Company* cases are applicable herein for purposes of Cities' request.

The Commission adopted this position in Opinion 807-A, in which it revoked joinder of FP and FPL and excluded transportation gas from the curtailment proceeding.

Petitioners advance several arguments in support of their attack on the Commission's order. The first is that § 1[51] of the Act grants the Commission the jurisdiction to curtail any gas that is

[49]See note 2, *supra.*

[50]See note 17 *supra.*

[51]Section 1(b), 15 U.S.C.A. § 717(b):

(b) the provisions of this chapter shall apply to the transportation of natural gas in intersate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

transported in interstate commerce, regardless of who owns it. As authority for this statement, it cites two Supreme Court opinions, *FPC* v. *Louisiana Power and Light, supra,* and *California* v. *LoVaca Gathering Co.*, 1965, 379 U.S. 366, 85 S.Ct. 486, 13 L.Ed.2d 357. We think both cases distinguishable.

In *Louisiana Power & Light* the Commission had imposed an interim curtailment plan to cover all sales customers of United Gas Pipe Line Company, both direct and resale. In rejecting the direct customers' objection that their sales were not jurisdictional and, therefore, could not be curtailed, the Court said that "the Act applies to interstate 'transportation' regardless of whether the gas transported is ultimately sold retail or wholesale." 406 U.S. at 636, 92 S.Ct. at 1836.

Petitioners would have us find that just as it was unnecessary in *Louisiana Power & Light* to find direct sales jurisdictional for rate purposes, it is unnecessary to deal with the ownership of transportation gas. We cannot make the logical connection necessary to reach such a conclusion. The Supreme Court dealt only with the issue of whether the Commission could, independently of its sales jurisdiction, supervise curtailment of gas owned by a natural gas company.[52] It made this clear when it explained that [u]nder LP&L's argument, this volume would be

[52]The same reasoning would refute petitioners' assertion that "the fact of transportation in interstate commerce was the sole key to Commission jurisdiction in . . . *Ft. Pierce* [*Fort Pierce Utility Authority* v. *FPC*, 5 Cir., 1976, 526 F.2d 993]. In that case, as in *Louisiana Power & Light*, the Court upheld Commission jurisdiction over direct sales by FGT.

Petitioners also cite the *Assigned Car Cases*, 1927, 274 U.S. 564, 71 L.Ed. 1204, 47 S.Ct. 727. We, however, agree with the Commission that the Supreme Court's holding in that case does not support petitioners' position. This is made clear by the following excerpt:

The rule does not divert the surplus of cars owned by one shipper to use by another. It merely puts a restriction upon the use of the private car by limiting the number of the so-called assigned cars, which may be placed at a particular mine at a particular time. The owner may use the surplus elsewhere. Or he may lease the surplus cars to the carrier to to another shipper.

[53]The Court admitted this when it said that "we cannot say that the adjudicatory process is not an appropriate method for drawing the line [between "jurisdictional" and "non-jurisdictional" sales] case-by-case . . . ." 379 U.S. at 371, 85 S.Ct. at 489.

wholly exempt from any curtailment plan approved by the FPC and thus United's resale customers would be forced to accept the entire burden of sharply reduced volumes while direct-sales customers received full contract service. . .

Id. at 632, 92 S.Ct. at 1834. We cannot extend the Court's holding to allow Commission-ordered allocation of gas owned by two companies that are not subject to Commission jurisdiction.

Similarly, we do not agree with petitioners that *Lo Vaca* provides a basis for including FGT's transportation gas within the Commission's jurisdiction. In that case El Paso Natural Gas Company purchased gas produced in Texas by Lo Vaca and Houston Pipe Line Company. Pursuant to its various contracts with Lo Vaca, El Paso bought gas both for resale (jurisdictional) and for its own use (non-jurisdictional). El Paso's contract with Houston restricted the gas to intrastate uses (non-jurisdictional). The Commission held that the commingling of the three supplied established FPC rate jurisdiction over the entire amount owned by El Paso.

The Supreme Court affirmed the holding, but we think that it made clear that the particular facts of the situation dictated the result.[53] Expressing fear that a contrary holding would allow

pipelines to discriminate between producers by "immuniz[ing] [some] from the reach of federal regulation," 379 U.S. at 370, 85 S.Ct. at 488, the Court found that "the fact that a substantial part of the gas will be resold, in our view, invokes federal jurisdiction over the entire transaction." *Id.* at 369, 85 S.Ct. at 488. The Court has never extended this holding beyond the facts of this case — petitioners have not convinced us that we should. Trying a slightly different tack, petitioners claim that the Commission has recognized its jurisciction in at least two specific situations, in the Sea Robin proceedings[54] and in *Fort Pierce Utility Authority, supra.* We disagree. In *Fort Pierce* several of the petitioners before us today had applied for special relief from FGT's curtailment plan. They contended that transportation gas should be curtailed to help relieve the burden on FGT's sales customers. The Commission found that a special relief proceeding was an inappropriate forum for consideration of the question. It neither admitted nor denied jurisdiction. It simply ruled that the parties would have to reassert their claim pursuant to § 1.6 of the Commission's Rules of Practice and Procedure, 18 CFR § 1.6 (1975).[55]

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[54]Florida Gas Transmission Co., Docket Nos. CP 65-393, *et al.* (Order Granting and Conditioning Certificate of Public Convenience and Necessity, issued May 2, 1977, and Order Denying Rehearing, issued July 27, 1977).

[55]Section 1.6 in relevant part:

(a) Any person, including any state or local commission, complaining of anything done or admitted to be done by any licensee, public utility or natural gas company in contravention of an act, rule, regulation or order administered or issued by this commission, may file a complaint with the commission. . . . If, in the judgment of the commission a violation of an act, rule, regulation or order administered or issued by this commission, has been alleged and has not adequately been satisfied it will either invite the parties to an informal conference, set the matter for a formal hearing, or take any other action which in the judgment of the commission would be appropriate. In the event that a hearing is held the complainant automatically will be a party thereto and need not file a petition for leave to intervene.

In *Sea Robin* the Commission granted certification for the transportation of new deliveries of offshore gas by Sea Robin Pipeline to Amoco for sale to FGT. It conditioned the certificate upon the requirement that "the gas involved shall be delivered to FGT only in satisfaction of the Amoco-FGT sale and none. . . to [FPL]." The Commission acted upon the authority expressly granted it in § 7(e)[56] of the Act to "lay down conditions precedent to the entry of natural gas into interstate commerce." It did not purport to assert curtailment authority over transportation gas. It did not force the pipeline to reallocate gas it did not own — Sea Robin would still deliver all the gas to Amoco, a natural gas company, over which the Commission has jurisdiction. The situation is clearly distinguishable from that presented here.

A recent case from the District of Columbia Circuit, *American Public Gas Association (APGA)* v. *FERC*, 1978, 190 U.S. App. D.C. — 587 F.2d 1089, lends support to the result we

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[56]Section 7(e), 15 USCA § 717f(e):

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

reach today.[57] In rejecting a claim that certain transportation gas had to be included in pipeline curtailment plans, the Court said that

> . . . the purpose of a curtailment plan is to prescribe the manner in which a pipeline that cannot meet its contractual commitments will curtail deliveries of its *own gas*.

190 U.S.App.D.C. at — 587 F.2d at 1098.

The excerpt from APGA describes the situation before us. FGT stands in the position of a bailee in relation to FP and FPL. We think that the Commission correctly determined that because FGT never owned the gas, it could not be compelled to allocate it to others. The transportation gas has never been a part of the supply available to FGT for satisfaction of its sales contracts. We see no authority for making it so now.

[13.14] Having determined that the Commission correctly

[57]Petitioners question the vitality of *American Public Gas Association*, contending that *California* v. *Southland Royalty Co.*, 1978, 436 U.S. 519, 98 S.Ct. 1955, 56 L.Ed.2d 505, undermines the District of Columbia Circuit's reasoning. They maintain that the Supreme Court's holding makes clear "that concepts of legal title and ownership are not the basis for determining the Commission's authority under the Natural Gas Act." Contrary to this assertion, the Southland Court spoke only with regard to the dedication of natural gas to interstate commerce. It held that once gas has been dedicated, it may not be diverted without abondonment authoriization, regardless of whether the party that dedicated the gas has continuing title to it. It did not purport to expound the principle that property rights will in all cases be inferior to FERC authority.

The case before us does not involve abandonmnet. Nor does it involve gas over which the Commission once had jurisdiction. We find *Southland* inapplicable.

found that it had no jurisdiction over the transportation gas, we find it unnecessary to address fully petitioners' other arguments. We merely point out that the Commission's legal conclusion did not constitute a factual determination that the curtailment of transportation gas would not result in greater availability to some higher-priority users. Neither did it implicitly approve undue discrimination in allocation of supplies. Finding that the Commission acted reasonably, we affirm.[58]

ENFORCED.

[58]To the petitioners' argument that the Commission's action regarding transportation gas has unlawful anticompetitive effect, we answer that we agree with the Commission on this point. Although the FERC has a responsibility to consider competitive impact in matters properly before it, see, e.g., *FPC* v. *Conway Corp.*, 1976, 426 U.S. 271, 96 S.Ct. 1999, 48 L.Ed.2d 626, alleged anticompetitive effect, in and of itself, does not create jurisdiction over natural gas.

APPENDIX B

United States Court of Appeals
FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

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April 11, 1979

Mr. Howard Shapiro, Solicitor
Federal Energy Regulatory Commission
825 No. Capitol St., N.E.
Washington, DC 20426

Nos. 77-2911 & 77-2972 - Sebring Utilities Commission, et al. vs. F.E.R.C.
(FERC Nos. RP75-79 Ops. 807d, 807-A)

Dear Sir:

(XX) Enclosed is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

( ) Enclosed is a certified copy of the Rule 21 Decision in the above case issued as and for the mandate.

( ) Having received from the Clerk of the Supreme Court a copy of the order of that court denying certiorari, I enclose a certified copy of the judgment of this Court in the above case, issued as and for the mandate.

( ) We have received a certified copy of an order of the Supreme Court denying certiorari in the above cause. This court's judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

(XX) Copy of the Court's opinion.

( ) Original record on appeal or review.

( ) Original exhibits.

(XX) Bill of Costs approved by this Court.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By Brenda Hauck
Deputy Clerk

BH:rcv
enc.
cc: BILL OF COSTS ONLY to
ALL COUNSEL OF RECORD

APPENDIX C

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

OPINION NO. 807

Lehigh Portland Cement Company
Complainant
v. Docekt No. RP75-79

Florida Gas Transmission Company
Respondent

OPINION AND ORDER REQUIRING FILING
OF CURTAILMENT PLANS

Issued: June 24, 1977

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Lehigh Portland Cement Company
Complainant

v. Docket No. RP75-79

Florida Gas Transmission Company
Respondent

OPINION NO. 807

APPEARANCES

E.W. Hyland and *Stephen A. Herman* for Lehigh Portland Cement Company

Frederick M. Lowther and *Richard P. Perrin* for Adams Packing Association, Inc., Citrus World, Inc., and Plymouth Citrus Products Cooperative

Douglas Essy and *William I. Harkaway* for City Gas Company of Florida

George H. Salley for Maule Industries, Inc.

Paul W. Fox and *John W. Glendening, Jr.*, for Peoples Gas System, Inc.

William M. Sawyer and *Lynn R. Coleman* for International Minerals and Chemical Corporation

Stanley W. Balis and Charles F. Wheatley, Jr., for Lake Worth Utilities Authority

Stephen Angle and *J. David Mann, Jr.*, for Florida Public Utilities Company

Alan Roth, Daniel Guttman, and *Robert A. Jablon* for Gainesville-Alachua Regional Utilities, Sebring Utilities, Utility Authority of the City of Fort Pierce, and the Cities of Lakeland, Gainesville, Homestead, Kissimmee, and Tallahassee

Ned Willis for Southern Gas Company, Division of Donovan Companies, Inc., Gainesville Gas Company, and Gulf Natural Gas Corporation

Eugene F. Threadgill for Central Florida Gas Corporation, Plant City Natural Gas Company, Miller Gas Company, and City of St. Cloud

Charles F. McGee and *Phil W. Jordon* for Gardinier, Inc.

Thomas F. Brosnan, James M. Broadstone, and *R. Y. Patterson, Jr.*, for Florida Gas Transmission Company

Bruce F. Kiely and *John Siegfried* for Buckeye Cellulose Corporation

Ernest C. Baynard, III, for Plant City, St. Cloud, and Central Florida Gas Corporation

Joel M. Cockrell and *Don Fullerton* for the Staff of the Federal Power Commission

DISCRIMINATION, CURTAILMENT
(End-Use) ANTITRUST LAWS,
CURTAILMENT PRIORITIES

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners:
Richard L. Dunham, Chairman;
Don S. Smith, John H. Holloman III,
and James G. Watt.

Lehigh Portland Cement Company
Complainant

v. Docket No. RP75-79

Florida Gas Transmission Company
Respondent

OPINION NO.

OPINION AND ORDER REQUIRING FILING OF CURTAILMENT PLAN

(Issued June 24, 1977)

HOLLOMAN, Commissioner.

In this proceeding Lehigh Portland Cement Company[1] on March 21, 1975, filed a complaint against Florida Gas Transmission Company (FGT) under Sections 4, 5(a), 14(a) and 16 of the Natural Gas Act and the Commission's Rules. Lehigh alleged that FGT's present curtailment plan, which is not based on end-use and does not resemble the curtailment plan set forth in the Commission's Policy Statement, Order No. 467 and following orders[2], is unreasonable, unduly discriminatory and preferential and unlawful because it grants a preference to indirect (resale) customers over similarly situated direct customers. The complaint requested that an end-use curtailment plan be established for the FGT system by which direct and

[1]Rinker, Portland Cement Corp. (Rinker) has since purchased Lehigh's plant involved here and, at its request, has been allowed to intervene.

[2]18 CFR 2.78.

indirect customers using gas for similar end uses be curtailed similarly.

On April 25, 1975, FGT filed a response to Lehigh denying that its curtailment plan created an arbitrary preference in favor of the resale interruptible customers. Interventions in opposition to Lehigh's complaint were filed by a number of parties including City Gas Company of Florida (City Gas), which filed a motion to dismiss stating that Lehigh, as a direct interruptible customer of FGT, has no standing to file a complaint with the Commission. The Commission did not answer the jurisdictional question raised by City Gas but denied the motion to dismiss and on its own motion set the matter for formal hearing.

Hearings were held before Presiding Administrative Law Judge Israel Convisser in September and October 1975, briefs were exchanged, and the Judge issued his initial decision on August 5, 1976. The Judge concluded that there had not been an adequate showing of undue discrimination or prejudice, dismissed Lehigh's complaint and terminated the investigation. Exceptions were filed by Rinker, as purchaser of the Lehigh plant, by Adams Packing Association, Inc., Plymouth Citrus Products Cooperative, and Citrus World, Inc. (World), by Alumax Extrusions Inc., by Buckeye Cellulose Corporation, by Abitibi Corporation, by Gardinier, Inc. and by the Commission staff.[3] Briefs opposing exceptions were filed by a group of Florida Cities,[4] by Lake Worth Utility Authority, by City Gas, by

[3]Rinker, Adams et al. and their supporters, including the staff, will be referred to on occasion as Complainants.

[4]Ft. Pierce Utility Authority of the City of Ft. Pierce, the Gainesville-Alachua County Regional Electric Water and Sewer Utilities, the Sebring Utilities Commission and the Cities of Homestead, Kissimmee, Lakeland, Starke, and Tallahassee, Florida, and the Utilities Commission of New Smyrna Beach, Florida.

Southern Gas Company, Division of Donovan Companies, Inc., Gainesville Gas Company, and Gulf Natural Corporation, by International Minerals and Chemical Corporation, by Central Florida Gas Corporation,[5] and by Peoples Gas System, Inc.

BACKGROUND

FGT owns and operates a transmission system which transports gas from the Gulf States into Florida. It sells gas directly to industrial customers and for resale to distributing companies as firm gas (Rate Schedule G) and as interruptible gas (Rate Schedule I). It also transports gas which has been purchased by Florida Power Corporation (FP) and Florida Power & Light Company (FPL). It has a curtailment plan, which has been in effect since the company began operating in 1956. *Houston Texas Gas & Oil Corporation and Coastal Transmission Corporation*, 16 FPC 118 (1956).[6] This plan provides that (1) Firm direct sales, firm resale service (Rate Schedule G) and Firm transportation service shall receive the highest priority and be curtailed last, (2) Resale preferred interruptible service (Rate Schedule I) shall receive the next priority and (3) Direct sale preferred interruptible shall receive the lowest priority and be curtailed first (Ex. 21).[7] As a result of the Commission's Order No. 431.[8] which required the filing of

[5]The group opposing the Complainants and supporting the Judge will be referred to on occasion as Opponents.

[6]Affirmed *Florida Economic Advisory Council* v. *F.P.C.*, 251 F.2d 643 (CADC-1957), certiorari denied 356 U.S. 959 (1958).

[7]Primary and intermediate interruptible service would be curtailed before direct sale preferred interruptible service (Ex. 21), but primary and intermediate service are no longer provided by FGT (Tr. 502, 531).

[8]*Policy with Respect to Establishment of Measures*, 45 FPC 570 (1971).

curtailment plans, FGT filed a report on May 17, 1971, in Docket No. R-418 stating that no changes in its existing tariff provisions were necessary (Tr. 502), and this was never acted upon by the Commission.

Lehigh operated, and now Rinker operates a cement manufacturing plant in Dade County, Florida. Rinker utilizes natural gas in that plant to heat directly raw materials in the process required for the production of portland cement (Tr. 48). The cement is sold to ready-mixed concrete producers, concrete block and products manufacturers, construction contractors, and building materials dealers, and used in Rinker's own ready-mixed concrete and cement block plants (Tr. 50).

Lehigh on November 15, 1968, signed a direct sale contract with FGT to receive natural gas service up to 86,400 therms per day. The contract states that delivery is subject to curtailment or interruption on a preferred interruptible basis (Ex. 1, Article X, p. 8). FGT's witness W.J. Smith, its Vice President for sales, explained that during negotiations inadequate pipeline capacity curtailment had occurred to direct interruptible customers in three-year cycles increasing up to 25 days per year and then dropping off to virtually no curtailment immediately following pipeline expansion (Tr. 594). At the time of the contract negotiations FGT did not foresee the present gas shortage and expected to provide the substantial volumes set forth in the contract (Tr. 585). Curtailments at the Lehigh plant have been as follows (Tr. 52):

1970—No curtailment
1971—14 days
1972—54 days
1973—125 days

1973—125 days
1974—181 days
1975—335 days (estimated)
1976—294 days (estimated)

A resale interruptible competitor of the Lehigh plant, Maule Industries, Inc., entered into a contract with City Gas in January 1969 for a full gas supply (Tr. 802). At first Lehigh and Maule took similar amounts of gas. Thus in 1971 Lehigh took 27,170,881 therms and Maule took 26,099,782 therms, but by 1974 Lehigh took only 13,399,609 therms and Maule took 24,423,898 therms (Tr. 811; Ex. 3). As a group it has been estimated that for the period April 1975 through March 1976 the direct preferred interruptible customers would be curtailed 352 days compared to 79 days for the Resale I customers (Ex. 23A).

The record shows that manufacturing cement with oil as a fuel has been more expensive than using natural gas. Lehigh's witness stated that its fuel costs during the first six months of 1975 were $0.700 per MMBtu, for natural gas and $1.873 per MMBtu for alternate fuel (Tr. 53). This amounted to $3.73 per ton of finished cement for natural gas compared to $9.08 per ton for alternate fuel, or a difference of $5.35 per ton (Tr. 54). These fuel costs are related to a price of $36 per ton for finished cement in the Florida market.

Although the product is different, the citrus intervenors have a similar problem. Adams is a citrus processor in Auburndale, Florida. It takes fresh fruit from the growers and processes it into citrus products. Adams sells the processed product, deducts the expenses and returns to the grower what is left (Tr. 209, 215). Steam is used in processing and fuel is required. Adams has a contract with FGT for the purchase of gas. Prior to 1972 curtailments were minimal. During the 1972-1973

season FGT curtailed Adam's gas supply for 57 equivalent days; during the 1973-74 season, 127 days; and for the 1974-75 season 173 days (Tr. 211). The schedule for 1975-76 showed complete curtailment from November through March, the peak processing months (Ex. 12).

Adams' witness states that its total energy costs during the 1974-75 season were $895,708, while the then effective natural gas rates ($.06 per therm) using 100 percent gas would save Adams $614,177 in fuel costs. He further testified that energy costs represented nearly 15 percent of processing costs for orange juice concentrate in bulk, but use of natural gas would cause these costs to drop to about 5 percent of the total processing cost. In the 1974-75 season curtailment reduced Adams' return by 6 cents per box of fruit (Tr. 212). The witness said that a few cents difference in return may result in the growers taking their business to another processor.

Plymouth is made up of 21 fresh fruit houses which provide a service for the growers. Until 1972 Plymouth experienced only nominal interruptions, but was scheduled to be curtailed for 341 days in 1975 (Tr. 356). Because Plymouth must burn Bunker C oil cost increases have been experienced and Plymouth's ability to obtain high quality fruit has been impaired; complete curtailment would cause its cost to increase by 6.5 cents per box of fruit. (Tr. 357).

World is a Florida Cooperative Association which has as its members eleven fresh fruit packing houses (Tr. 445). During the 1969-1970 Florida citrus season World obtained 72 percent of its fuel requirements from gas but for 1975-1976 expected to receive only 4.43 percent of its fuel requirements as gas. In contrast it was estimated that purchasers through Central Florida Gas Company would receive 82 percent of their requirements as gas (Tr. 448). The cost differential between oil and gas would amount

to $1,000.000 over the course of a year (Tr. 449). The differential per box of fruit as between the direct customer and the resale customer based on the above expected usage by World would amount to 7.84 cents per box of fruit (Tr. 449).

THE INITIAL DECISION

The Judge finds that FGT's curtailment plan has not been shown to be unduly or unreasonably preferential, prejudicial or discriminatory. He points out the FGT's present plan has survived attack in Opinion Nos. 611 and 611-A, *Florida Gas Transmission Company*, 47 FPC 341, 380-381 (1972); 49 FPC 261, 267 (1973), and those who renew the assault assume a heavy burden of overcoming the earlier-established approval. The Judge emphasizes that the question is whether the discrimination results from a reasonable classification; that is whether it serves a reasonable regulatory purpose. He points out that the interruptible customers of the distributors are needed to help carry the cost of operating the distribution systems and relieve the residential consumers of costs they would otherwise have to bear.

In his view it is not enough for Lehigh and its supporters to show that their gas supplies are being curtailed more than the distributor customers and that they must bear the cost of more expensive oil; they must show substantial harm, and that this is absent here. He says that it must be shown to what extent Lehigh and the citrus processors are able to operate profitably, and also their competitive position in the market. This has not been shown particularly in view of their unwillingness to divulge their total costs. He therefore ordered the complaint dismissed and the investigation terminated for want of an adequate showing of undue discrimination or prejudice.

PRIOR DECISION IN OPINION NOs. 611 and 611-A

The Judge's use of Opinion Nos. 611 and 611-A to support FGT's present curtailment plan has been challenged by some of the supporters of Lehigh's complaint including Rinker, the citrus processors, Abitibi, and the staff. They argue variously that the initial decision erroneously relies on these opinions as establishing the invulnerability of FGT's tariff. They say the purpose of the tariff was originally to provide a procedure for temporarily reducing service to designated classes of customers at times of limited pipeline capacity, but today curtailment has been the result of a gas shortage rather than a capacity shortage. They point out that the determination of the Commission in Opinion No. 611 not to change the curtailment at the time was based on an increase in the rate for the indirect preferred interruptible service. They say also that in Opinion No. 611-A the City of Gainesville, with a direct sale for power plant use, was arguing that it should have priority over the indirect sales. Further, they argue, it was improper to apply the doctrine of *res judicata* to a situation where an administrative agency is not adjudicating past facts, but is contemplating regulatory action and must be free to act. They add that Opinion Nos. 611 and 611-A were rendered before the present natural gas shortage.

The opponents of Lehigh argue that while Opinion Nos. 611 and 611-A may not determine the question on the basis of *res judicata*, the Commission should give weight to its prior decisions upholding FGT's curtailment plan.

In the present proceeding the factual situation with regard to the gas shortage has changed radically. Further, we do not have a rate case before us but a question of discrimination in allocating diminishing supplies of gas. We agree with the supporters of Lehigh that we must make such regulatory changes that are now

appropriate; we are not bound by past determinations based on different circumstances.

THE ISSUE OF DISCRIMINATION

The Complainants contend that FGT's curtailment tariff is discriminatory in that the direct interruptible customers are curtailed before the indirect interruptible customers. Rinker compares the direct sale Lehigh plant in Dade County with the indirect sale Maule plant located five miles away. It notes the following similarities.

1. Both plants were originally of approximately the same size (Tr. 54-55, 139).

2. They both used a similar process (Tr. 49, 108-109, 800).

3. Both plants used approximately the same volumes of gas prior to FGT curtailments (Ex. 3; Tr. 811).

4. Both plants have installed alternate fuel oil capability (Tr. 52, 800, 831).

5. Both plants would be classified in Order No. 467-B Category 8 as having interruptible requirements between 3,000 and 10,000 Mcf per day with alternate fuel capabilities (Ex. 26, p. 3; Ex. 27, p. 3; Tr. 705-A)

6. Both plants compete in the same marketing area (Tr. 54; Ex. 6; Tr. 711-712).

Yet, as noted earlier, in 1974 Maule received almost twice as much gas as Lehigh.

The Complainants argue that the Judge was incorrect that a

cost differential between the use of gas and alternate fuels does not support a finding of undue prejudice. As noted, he thought that a difference in total manufacturing costs was necessary to show a loss of competitive position.

In support of the Judge the Opponents argue that the record is devoid of information showing that increased fuel costs have caused Complainants to suffer unduly either in regard to their own prior performances or to the performance of competitors. Thus Florida Cities note that, while fuel costs are significant, Rinker has declined to reveal its costs of manufacturing cement (Tr. 53). They argue that the cost differential between oil and gas should be reduced by the Commission's Opinions No. 770 and 770-A.[9] They further argue that Maule does not have sufficient gas to meet all of its requirements, and the Maule-Rinker fuel cost differential may be affected by the wide variance among manufacturers in the amount of Btu's required to produce a barrel of cement. Also they say that while there is evidence that Rinker's profitability has declined, non-fuel factors are the primary cause. In this connection they observe that General Portland Cement competes successfully, yet uses no gas at all (Tr. 69, 100).

Lake Worth points out that in the Lehigh-FGT contract Lehigh is required to take a minimum quantity of gas (Ex. 1); beyond that it can use oil and could do so when the price of oil was lower than that of gas. On the other hand Maule, by contract, could use only gas in the equipment that uses gas (Ex. 7, Ex. I, p. 2). Lehigh was thus getting what it bargained for and should not be able to obtain more rights to gas because of a shortage than it

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[9] *National Rates for Jurisdictional Sales of Natural Gas*, FPC ____, Opinion No. 770, Docket No. RM75-14, issued July 27, 1976; ____ FPC ____, Opinion No. 770-A, issued November 5, 1976.

had prior to the shortage. Lake Worth also notes that the cost of cement is only part of the cost of the concrete mix or cement blocks (Tr. 134) and hence the importance of fuel costs is reduced. It also contends that Lehigh has failed to carry its burden of showing that the higher cost it pays for oil results in a competitive disadvantage.

Lake Worth makes similar arguments with respect to the citrus processors pointing out that originally they had operated on oil. It notes that the witness for Plymouth admitted that when it decided to purchase directly from FGT it was aware that it would be curtailed before the customers' of distribution companies (Tr. 379-80), and when it had a possible opportunity to switch to resale service in 1969, it decided that direct service with lower gas costs outweigh the burdens (Tr. 376, 407). Further, Lake Worth notes that while there are 26 resale citrus processor competitors in Florida, there are also 18 processors which use only oil and all have remained competitive Ex. 13 (revised); Tr. 232-233). It adds that fuel cost is only one of many cost factors and there has been no real competitive injury to Adams, Plymouth and World.

City Gas points out that it has invested in distribution facilities and that the company and consumers depend on costs being born by the 1 resale customers. The same and similar arguments are made by the other parties filing briefs opposing exceptions—Southern Gas *et al.*, Peoples Gas, Central Florida, and International Minerals.

In the opinion of the Commission it is not necessary to show higher overall costs of doing business or a competive disadvantage in order to prove undue discrimination or preference in favor of others. The essence of the principle is that those who are similarly entitled must be treated equally regardless of their ability to survive otherwise.

This approach is supported by past decisions of this Commission and by the courts where the concept of discrimination did not appear to require a showing of lessened ability to survive otherwise.

This approach is supported by past decisions of this Commission and by the courts where the concept of discrimination did not appear to require a showing of lessened ability to compete. In *Otter Tail Power Company*, 2 FPC 134, 145 (1940) the Commission found rate discrimination because of a difference in rates charged various wholesale municipal customers within the same class or classification. In *Tennessee Gas Transmission Company*, 11 FPC 685, 690 (1952) it was said that the Commission has a duty to see that just and reasonable uniform rates are maintained for equal service under substantially similar maintained for equal service under similar conditions. In *City of Detroit, Michigan et al.*, 6 F.P.C. 196, 203 (1947) the Commission found that during an emergency gas shortage situation the rate schedules of Panhandle Eastern Pipe Line Company did not provide effective rules to govern and control deliveries and to assure reasonable and nondiscriminatory services to the purchasing utilities and therefore were unjust, unduly discriminatory and preferential. In *Panhandle Eastern Pipe Line Company* v. *Mich. Consolidated Gas Co.*, 7 FPC 48, 62 (1948) the Commission held discriminatory Panhandle's granting firm contracts to direct sale makers of refractory materials but not to other direct industrial or wholesale customers.

In *Panhandle Eastern Pipe Line Company*, 13 FPC 301, 310 (1954), affirmed 232 F.2d 467, 472 (CA3-1956), certiorari denied 352 U.S. 891 (1956) the Commission found that it was discriminatory to set up a curtailment priority that would be available only to direct interruptible customers as against its resale customers. In *Georgia Power Company*, 35 FPC 436, 448

(1966) the Commission held discriminatory provisions in contracts with municipalities that limited their right to sell electric energy for resale and varied from one customer to another.

In *American Smelting and Refining Company* v. *F.P.C.*, 494 F.2d 925 (CADC-1974), certiorari denied 419 U.S. 882 (1974), the Court upheld the Commission for the most part in finding that the curtailments under El Paso's tariff would result in cutting off not only commercial customers east of California but residential customers also, while California would not be curtailed at all. There was no discussion of the costs or competitive position of the various groups of customers.

In *Louisiana Power and LIght* v. *F.P.C.*, 526 F.2d 898 (CA5-1976) the Commission had determined that an interim four-priority plan of curtailment, which gave the electric utilities priority over industrial customers, had become unjust, unreasonable, unduly discriminatory and preferential. The Court noted that the commission had based its conclusion first on the alternate fuel capabilities of the electric utilities and on irreparable injury to the industrial customers. The Court found that the Commission's conclusions as to irreparable injury were not supported by the record, but suggested that it may well be that any future elaboration of the statutory standard will dispense with the apparent requirement of a showing of irreparable harm (526 F.2d at p. 908).

The record here shows that there is a substantial disparity between gas deliveries to FGT's direct sale and resale customers under its curtailment plan and this has increased the cost of the direct sale customers, particularly the cement manufacturers and citrus processors. The record shows further that Lehigh and the Citrus Processors were not free to take direct service or indirect service as they chose. FGT has a policy that has been in effect

since 1968 and 1969 providing that new sales to industry should be made through distribution company customers where the industry was located in an area served by one of the distribution companies (Tr. 589). City Gas' witness testified that Lehigh was located in City Gas' service area (Tr. 915, 947), but witness Smith said FGT had not considered Lehigh within such a service area (Tr. 589-590, 749-750). Mr. Smith was also of the opinion that Plymouth and Citrus World were not within a distribution area and did not have a choice between direct and indirect service although there was some doubt about Adams (Tr. 611-612). We agree with staff that freedom of choice did not exist in view of FGT's stated policy and belief.

Even if the direct sale customers could be found to have entered into contracts with FGT directly in order to obtain certain advantages such as a lower price for gas or the option to use oil, which was then less expensive than gas, circumstances changed radically and what may once have been a non-discriminatory contract would have become a discriminatory one.

THE NECESSITY FOR AN END-USE CURTAILMENT PLAN

The Complainants and the staff argue variously that giving resale interruptible service a preferred status over direct preferred interruptible service in time of gas shortage contradicts the Commission's preference for an end-use formula which is intended to avoid unlawful discrimination. A non-end-use plan imposes a heavy burden on its defenders. They argue that an end-use plan formula would protect high-priority and small-volume users, which would be under Priority 1 in Order No. 467-B.[10]

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[10]49 FPC 583 (1973).

Without an end-use plan these high priority customers would be curtailed to the same degree as power plants in Priority 9. They contend that the initial decision erroneously disregards end-use curtailment principles which have been mandated by the Commission and approved by the curts. They ask that the Commission require FGT to file an end-use plan. Abitibi, which says it is a resale interruptible customer of FGT through the City of Blountstown, objects to the difference in curtailment of firm and interruptible customers as well as direct and indirect customers and argues in favor of an end-use plan.

Among the Opponents, cities argue that the present curtailment plan protects the residential and commercial high priority resale customers as firm customers while the large interruptible customers are given a lower priority. Cities contend that the higher priority resale interruptible customers could apply for special relief which should be provided at the local level. City Gas and Central Florida ask that the pieplines be treated individually and contend that general policy statements are not a basis for setting aside a tariff. Lake Worth says that for some residential consumers the adoption of a 467-B plan on the FGT system would be counter-productive since distributors may be forced out of business because of the loss of the I volumes. Southern Gas et al. argue that any discrimination as to the availability of gas does not mandate that FGT file as an end-use curtailment plan and the possibility that some high priority indirect customers may be curtailed pro-rata with low priority users is no basis for striking down the present curtailment plan. Also they say that discarding the present curtailment plan will impair the operations of a number of distributors while a 467-B priority plan will provide little benefit to others. Loss of the interruptible revenue would require the distributors to raise the rates substantially for their firm customers, and the direct customers, such as Rinker and the Citrus Intervenors would

receive essentially no more gas under a 467-B curtailment plan. Peoples Gas emphasizes that the mild climate of Florida without a large heating load makes it necessary for the distribution companies to depend on their interruptible industrial loads.

The Commission, with the approval of the courts, has favored end-use curtailment plans, and there is a heavy burden to show that a non-end plan is superior. In its Statement of Policy, Order No. 467[11], the Commission said:

> "In establishing the priorities-of-service for the use of the natural gas supply it is obvious that some direct and indirect customers use their supply of natural gas for similar end-use purposes. Customers with similar usages for the fuel should be accorded the same treatment to avoid any undue discrimination or preference among them. Accordingly, we will place the direct and indirect customers in the same priority-of-service position when their use of natural gas is comparable.

Cited by the staff, *American Smelting* states that "end use is a most appropriate consideration for purposes of a curtailment plan";[12] in *Rhode Island Consumers*[13] the court noted that the "principle of designating end-use priorities has been reflected in permanent plans approved since promulgation of Order 467;" and in *State of Louisiana* v. *F.P.C.*,[14] the court in discussing the

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[11]49 FPC 85, 86-87 (1973). See also *Arkansas Louisiana Gas Company*, 49 FPC 53, 65-66 (1973), remanded on other grounds, *Arkansas Power & Light Co.* v. *F.P.C.*, 517 F.2d 1223 (CADC-1975), certiorari denied 424 U.S. 933 (1976).

[12]*American Smelting and Refining Company* v. *F.P.C., supra*, 494 F.2d at p. 936.

[13]*Rhode Island Consumers Council and Division of Public Utilities, etc.* v. *F.P.C.*, 504 F.2d 203 (CADC-1974).

[14]503 F.2d 844, (CA5-1974).

firm-interruptible distinction said that "if interruptible customers really do make inferior uses of this gas, why inject any factor in addition to end use? Why not curtail simply on the basis of end use".

In Opinion No. 754, *Panhandle Eastern Pipe Line Company*, ___ FPC ___, Docket No. RP71-119, issued February 27, 1976, the Commission concluded that it should require curtailment according to end-use alone, eliminating the firm-interruptible distinction. It said in Opinion No. 754-A[15], "this final attempt to protect indirect service, without regard to end-use considerations will be rejected."

It is clear from this record that the direct sale customers, particularly the cement companies and the citrus processors, that use gas in approximately the same way as the resale interruptible customers are receiving less gas and are paying higher costs for fuel. A 467-B type end-use curtailment plan would treat such industrials in the same way. Such a plan is necessary to avoid discrimination. It is estimated that a 467-B type plan would not affect FGT's resale firm sales (Rate Schedule G), the transportation volumes or the direct firm sales, but would affect the direct preferred interruptible sales and resale interruptible sales (Rate Schedule I) (Ex. 24). For the direct interruptible complainants the deliveries based on 1975 volumes (MMBTU) are estimated as follows:

	467-B Priorities	Existing Priorities
Lehigh Portland	889,063	145,683
Adams Packing	134,590	18,412
Citrus World	213,359	28,262
Plymouth Citrus	180,892	26,550
TOTAL DIRECT GROUP	23,902,465	16,092,094

[15] ___ FPC ___, Docket No. RP71-119, issued August 17, 1976.

The resale interruptible customers (Rate Schedule I), as a group would lose gas although a greater number, usually smaller distributors, would receive higher deliveries. Examples are as follows:

Central Florida	3,480,074	4,532,743
Florida Gas, Miami	996,066	854,846
City Gas (Several Towns)	4,033,675	5,031,810
Indiantown	702,191	697,585
Clearwater	740,578	672,126
TOTAL GROUP	35,276,235	43,086,606

We are aware that later evidence in the record indicates that because of a decrease in the gas supply Lehigh and the other complainants might gain little or anything from a 467-B plan of curtailment. Thus it was estimated that compared with the year 1975 annual deliveries for the period April 1975 through March 1976, would decrease from 222, 345,000 MMBtu to only 203,857, 150 MMBtu (Exs. 23, 23-A; Tr. 880-883). Under these conditions FGT's witness Smith testified that the direct customers would get very little from a 467-B plan (Tr. 886). However, we observe that under our recent order of May 2, 1977[16], the supply of gas to FGT would be increased by 16,790 MMcf per year, and this might well have the effect of increasing the gas available to category 8 customers, which include the Complainants here (See Tr. 897). In any case a curtailment plan should not be so devised that if there is gas in category 8, it will not be shared with the direct customers as well as the indirect.

The staff notes that City Gas Witness Ball testified that if

[16] *Florida Gas Transmission Company et al.*, ___ FPC ___, Docket No. CP65-393, *et al.*

City Gas lost 100 percent of the Maule load and 100 percent of its next largest account, it would suffer a revenue impact of $468,000 (Tr. 92). If this is divided by the 68,000 residential and small commercial and industrial customers with firm gas, the impact would be only $6.88 per year on each customer although the Florida Public Service Commission might determine that the impact would fall differently (Tr. 928). While we can conclude that there will be some impact on the distributing companies and probably on the firm customers served with gas purchased from FGT under the G rate schedule, the impact may not be serious. In any case, the impact is the result of what we consider an even-handed allocation of a diminished supply of a very desirable fuel and is thus a burden that cannot be equitably avoided.

RELATIONSHIP OF ANTITRUST LAW TO END-USE PLAN

Rinker argues that the Commission must consider antitrust policies when deciding whether a particular tariff or certificate meets the Natural Gas Act's public interest standards. It says that one of the principles of the Sherman Act[17] is that an organization with monopoly power must treat competing users on a non-discriminatory basis. It concludes that FGT, as a lawful monopolist, must insure that competing customers do not receive unfair access to scarce gas and are curtailed in a similar manner.

Lake Worth and Southern Gas argue that FGT is not in competition with its customers and has no duty under the antitrust laws to see that its competing customers receive equal amounts of gas or that it is acting with any ulterior motive or seeking to create any undue preference.

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[17] 15 USC §1.

In our opinion Rinker has not shown that discrimination by a monopolist with respect to corporations with which it does not compete is a violation of the anti-trust laws. While it is true that we must take anti-trust concepts into consideration in arriving at a determination, it is not necessary to do so here because we have found that FGT's tariff does treat direct and indirect customers in a discriminatory manner and this is unlawful under the Natural Gas Act without considering the questions of anti-trust law.

FILING AN END-USE CURTAILMENT PLAN

The complainants ask that FGT be required to file an interim end-use curtailment plan. Since we have determined that the present plan is discriminatory and preferential, this is the logical remedy. As stated in its brief, FGT's witness Smith, believes that a 467-B type plan would better serve its customers because under this type of plan the pipeline may be able to improve its supply position and provide more reliable service for its small customers, who are least able to cope with curtailed service (Tr. 507-510). However, because in *City of Fort Pierce* v. *Florida Gas Transmission Company*, a stipulation was entered into before the United States District Court for the Southern District of Florida, Miami Division (Case No. 71-1494-CIV-CA) the pipeline did not propose to file a new curtailment tariff (Tr. 604-606; Exs. 29, 44).

In *Florida Hydrocarbons Company* and *Florida Gas Transmission Company*, ____ FPC ____, Opinion No. 774, Docket No. RP74-50-5, issued August 18, 1976, we stated our opinion that in dealing with a curtailment plan the Commission is not bound by agreements among parties subject to its jurisdiction. We also found that the stipulation provided that "unless the FPC hereafter takes action which directly or indirectly might require a different basis of curtailment, FGT will curtail on a basis that it in good faith believes will be fair and

equitable", and thus that the parties did not attempt to limit the Commission's jurisdiction over FGT's curtailment plan. However, since FGT is unwilling to file a new end-use plan on its own initiative, we shall order it to do so.

Cities argue that FGT's curtailment plan cannot be revised without a hearing and this should include FGT's transportation customers, FP and FPL. Cities points out that the two utilities use gas for the same purpose as Cities and other FGT customers and are competitors. While members of the Cities group were being curtailed, FP and FPL were not curtailed at all. (Exs. 22, 22-A, 23). It is clear to us that in a general revision of FGT's curtailment plan the place of the transportation gas should be considered and all parties should be able to present evidence on this issue. *Fort Pierce Utility Authority, etc.* v. *F.P.C.*, 526 F.2d 993, 999 (CA5-1976). We have authority over the allocation of gas not sold for resale. *F.P.C.* v. *Louisiana Power and Light*, 406 U.S. 621 (1973).

Therefore, we shall order FGT to file an end use curtailment in the light of Order 467-B, but adapted to its particular circumstances, and we shall provide for a hearing on the plan in which FP and FPL will be joined as parties. Abitibi's complaint filed by it in Docket No. CP77-44 will at its request be consolidated with the present proceeding.

The Commission further finds:

(1) The curtailment plan of FGT under present circumstances is unjust, unreasonable, unduly discriminatory and preferential.

(2) FGT should be required to file a new curtailment plan as provided below subject to further hearing.

The Commission orders:

(A) Within 90 days FGT shall file a curtailment plan based on end-use and providing equal treatment for direct and indirect customers making similar use of the gas. The plan shall be drafted in the light of the principles set forth in Order No. 467-B, Section 2.78 of the Commission's General Policy and Interpretations, but shall be adapted to FGT's particular circumstances.

(B) A hearing shall be provided upon further order of the Commission.

(C) FP and FPL are hereby joined as parties.

(D) Abitibi's complaint in Docket No. CP77-44 is hereby consolidated with this proceeding.

By the Commission.
(S E A L)

Kenneth F. Plumb,
Secretary.

APPENDIX C-2

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

OPINION NO. 807-A

Lehigh Portland Cement Company

V. Docket No RP 75-79

Florida Gas Transmission Company

OPINION AND ORDER DENYING REHEARING IN PART AND DENYING STAY IN PART

Issued: September 22, 1977

DC-B-8

DISCRIMATION, CURTAILMENT (End-Use), JURISDICTION (Transportation in Interstate Commerce), TRANSPORTATION IN INTERSTATE COMMERCE, CURTAILMENT PLAN

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Charles B. Curtis, Chairman;
Don S. Smith, and Georgiana Sheldon.

Lehigh Portland Cement Company

v. Docket No. RP 75-79

Florida Gas Transmission Company

OPINION NO. 807-A

OPINION AND ORDER DENYING REHEARING IN PART AND DENYING STAY IN PART

(Issued September 22, 1977)

Commissioner,

Applications for rehearing with respect to Opinion No.807 and order issued June 24, 1977, were filed on July 22, 1977, by Florida Gas Transmission Company (FGT), Florida Power Corporation (FP) and Florida Power & Light Company (FPL), and on July 25, 1977 by City Gas Company of Florida and Maule Industries, Inc., by Lake Worth Utilities Authority and Utilities Commission, City of New Smyrna Beach, by Central Florida Gas Corporation, by Southern Gas Company, Division of Donovan Companies, Inc., Gainesville Gas Company, and Gulf Natural Gas Corporation and by a group of Florida Cities. On July 26, 1977, Indiantown Gas Co., Inc., filed a petition for rehearing, but because it was not timely under Section 19 of the Natural Gas Act, it must be treated as a petition for reconsideration. FP filed a

supplement to its application for rehearing on August 5, 1977, and FP and FPL filed petitions to intervene on July 22, 1977.

In Opinion No. 807 the Commission determined that the curtailment plan of FGT under present circumstances is unjust, unreasonable, unduly discriminatory and preferential. The Commission said that it discriminates against its direct sale customers in favor of indirect customers, who receive gas on resale from distributing companies, and that FGT must file a curtailment plan based on end-use of the gas providing equal treatment for the direct and indirect customers making similar use of the gas. The plan was to be drafted in the light of the principles set forth in Order No. 467-B, Section 2.78 of the Commisson's General Policy and Interpretations, but was to be adapted to FGT's particular circumstances. The Commission also determined that the gas which FGT transports for FP and FPL for power plant use and has not been curtailed should be considered in the revision of FGT's curtailment plan. The order joined FP and FPL as parties and provided for a hearing upon further order of the Commission.

FGT also asked for clarification of the Commission's order with respect to the continued utilization of its current curtailment plan pending establishment of a permanent plan and Central Florida asked for a stay of the Commission's order pending judicial review. Lake Worth and New Smyrna Beach asked for a stay at least pending the issue of the Commission's final order on rehearing. By separate motion on July 25, 1977, Maule Industries asked for a stay of the Commissions's order until such time as the Commission passes on the application for rehearing of City Gas and Maule Industries, and, if such applicatin is denied, until a reviewing court has passed upon the lawfulnes of such order. On August 8, 1977, a group of Citrus processors and Rinker Portland Cement Corp. (formerly Lehigh Portland Cement

Company) filed answers; Gardinier, Inc. did so on August 29, 1977, and Abitibi Corporation and Alumax Extrusions Inc. did so on August 31, 1977, as permitted by the Commission. The Commission issued an order granting rehearing for purposes of further consideration on August 19, 1977. Florida Cities filed a response to the applications for rehearing on September 6, 1977, and FPL on September 14, 1977, filed a motion to reject the response of the Cities.

The larger issues involved here are (1) whether FGT's present curtailment plan under present circumstances is indeed discriminatory, (2) whether the Commission can properly consider the transportation gas in connection with a new curtailment plan, and (3) how should FGT's required curtailment plan filing be treated in order to afford due process and avoid hardship

DISCRIMINATION UNDER FGT'S PRESENT CURTAILMENT PLAN

As noted in Opinion No 807, FGT's present curtailment plan provides the highest priority to firm direct sales, firm resale service to distributors, (Rate Schedule G), which is to supply their residential and commercial customers, and firm transportatin service for the benefit of FP and FPL. Next in priority is resale preferred interruptible srvice (Rate Schedule I), which we have found has received an undue preference. Thirdly the lowest priority is assigned to the direct sale preferred interruptible customers, including the complaining parties Lehigh, now Rinker, and the Citrus processors (Adams Packing Asssociation, Inc., Plymouth Citrus Products Cooperative and Citrus World, Inc.). Abitibi Corporation, a resale preferred interruptible consumer of gas, nevertheless desires an end-use curtailment plan.

The applicants for rehearing, make a number of arguments in various forms in which they seek to justify the discrimination in the operation of FGT's curtailment plan in favor of the indirect customers and against and direct customers:

(1) A prevailing argument is that what the direct customers are really complaining about is that the price of oil is too high. The Applicants on rehearing say that the direct customers contracted directly for interruptible gas in order to obtain a competitive advantage when the price of oil was low knowing that they might be curtailed, but now want to change the rule. The applicants cannot understand why an increased price of fuel oil in the face of FGT's inability to serve its interruptible loads has converted a non-discriminatory contract into a discriminatory one.

As we see it, the price of oil did not make a non-discriminatory contract into a discriminatory one, but merely required us to recognize the situation. As expressed in Opinion No. 807, it is our opinion that in these times of gas shortage, it is in the public interest that customers with similar usages of the fuel should be accorded the same treatment regardless of their motives, or their contractural arrangements.[1] In some cases the consumers may prefer gas because of its innate qualities. As the witness for Plymouth testified, it would prefer gas even if the price of oil could be rolled back because it is a much cleaner fuel (Tr. 411-412).

In this connection the Commission has said that there was evidence that some of the direct customers were not free to take direct or indirect service as they chose because FGT has a policy

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[1]See Order No. 467, 49 FPC 85, 86-87 (1973).

that new sales should be made through distribution company customers where the industry was located in their area of service. Furthermore, the distributor under FGT's tariff would ask approval of FGT before serving a new resale customer (Tr. 587). In the case of Lehigh FGT considered the cement plant not sufficiently near an existing service area of a distributor (Tr. 540). It does not appear material that City Gas Company made an offer to Lehigh (Tr. 60). In any case the Commission is of the belief that whatever freedom of contrct the direct sale customers had, if they are using gas in the same way as the indirect customers, they should be trated equally.

(2) It is argued (see Lake Worth and New Smyrna) that a 467-B plan would give Lehigh an advantage over Maule because it would provide Lehigh with an equal amount of gas but Lehigh has only 409 percent of the capacity of Maule. We are making no decision here as to the precise terms of FGT's curtailment plan; if what is proposed would operate unfairly, objectin can be made at the hearing.

(3) The argument is continued that the direct customers have shown no competitive disadvantage because of receiving less gas as evidenced by the fact that cetain cement companies and citrus processors receive no gas at all. The Commission has dealth with these arguments in Opinion No. 807. The record shows that economic factors have a diverse impact on such customers but they offer no justification for disparate treatment of direct and indirect customers.

In this connection it is argued that the Commission took an inconsistent view in Opinion No. 809, *Boston Edison Company*, ___FPC___ Docket Nos. E-7738 and E-7784, issued July 6, 1977. There the Commission was dealing with an alleged price squeeze between Boston Edison's sales to its resale customers and

its direct sales, possibly causing the resale customers difficulty in competing with Boston Edison. The Commission, following *F.P.C.* v *Conway Corporation*, 426 U.S. 271 (1976), held that to show a price squeeze it was not enough to find that the wholesale and retail rates are different; there must be a showing of anticompetitive effect. The Commission said that the type of *per se* discrimination standard in Commission proceedings comparing two or more jurisdictional rates is beyond the scope of the price squeeze issue. The *Lehigh* case here concerns a difference in service, the difference in the amount of gas delivered; in our opinion such a difference is discriminatory regardless of whether a customer can carry on its business in spite of the discrimination.

(4) The further contention is made that the FGT system is atypical because of the mild climate in Florida. Thus the load factor of the residential and commercial customers is low, and it has been necessary for FGT to make industrial sales either directly or indirectly and to transport gas for FP and FPL to bear system costs. Further, this uniquely low load factor of residential and commercial customers requires, it is argued, substantial industrial sales by distributors in order to preserve their financial viability.

In Opinion No. 807 the Commission noted that in one case involving City Gas and Maule the record showed that the impact on the residential, small commercial and industrial customers would not be severe. In other cases it might be severe. Thus Indiantown Gas Company would never have build its system without the I customers, who represent 90 percent of the load. According to the testimony, the 411 residential customers could not alone bear the costs of this distributor (Tr. 1140-41). Unless the conditions of service are different there is no equity in treating the resale industrial customers differently than the direct

industrial customers because the distributor is faced with the necessity of raising its rates or is having financial difficulties. Where the situation is extreme and the distributor is in danger of going bankrupt we would, of course, entertain an application for special relief.

(5) The argument is made that since the initial certification of FGT's pipeline[2] the Commission recognized that FGT would have to be essentially an industrial pipeline and that industrial sales must provide basic economic feasibility. Further, it is argued, service should be rendered to the direct industrial customers only so long as it would not impair service to the resale customers[3] and that the Commission has expressed a preference for the resale over the direct sale market. The problem in establishing the FGT system was to increase the load factor of its pipeline. The transportation gas and industrial sales contributed to this end. There was logic in the method of operation by which preference was given to the sales for resale, which included the gas for high priority customers. Now however, the problem is lack of gas and the need to divide it among industrial customers, direct or indirect, who will use it under similar conditons as would be provided in an end-use curtailment plan.

(6) It is argued that the I rate, in addition to bearing the commodity cost of gas also contributes to the fixed costs of the pipeline and is higher than the rate to the direct sale customers. It is further contended that to inflict on the distribution customers a different curtailment plan and continued charges for resale I gas based upon the present curtailment plan is discriminatory. This is

[2]*Houston Texas Gas and Oil Corporation, et al.*, 16 FPC 118. (1956).

[3]*Coastal Transmission Corp., et al.*, 26 FPC 318 (1961).

not a rate case. Complaint can be made that the I Rate is unjustified under present circumstances. While the Commission can and does allocate costs between jurisdictional and non-jurisdictional services, so that jurisdictional services do not bear more than their share of the cost burden, it has no jurisdiction to determine the rate level for FGT's direct sales.

(7) It is further contended that there is no discrimination here in treating the direct and indirect customers of FGT differently because they are not similarily situated. Not only do the indirect customers pay a higher price, but the Rate Schedule G customer contracts for firm service and obligates itself to pay at a higher rate for gas thus giving the FGT system rate stability. We recognize that the indirect customers are served by distribution systems which are purchasing firm gas under the G Rate Schedule and have invested in facilities to serve the G customers in the belief that they could buy gas under the I schedule to serve their industrial customers. The way the indirect customers are served clearly does differ from the way direct customers are served, but this does not mean that the indirect customers use gas any differently or operate any differently than the direct sale customers.

It is pointed out that in Opinion No. 778[4] the Commission permitted Transco to curtail direct industrial customers ahead of indirect industrial customers. But the Commission explained that this was because no direct customer had received any gas from Transco since 1970.

(8) It is argued that the Commission improperly shifted the burden of proof in this complaint case in that it stated that there is

[4]*Transcontinental Gas Pipe Line Corporation*, ___ FPC ___, Opinion No. 778, Docket No. RP72-99, October 8, 1976.

a heavy burden to show that the curtailment plan on file is superior to an end-use plan. We recognize that the complainant has the burden of proof and that Order No. 467-B merely states our policy. We think, however, that the complainants have met their burden of showing that while they operate in like manner as the indirect customers they receive a smaller share of gas.

TRANSPORTATION GAS

In discussing its request that FGT be required to file an end-use curtailment plan the Commission said it was clear that in a general revision of FGT's curtailment plan the place of the transportation gas should be considered and all parties should be able to present evidence on this issue. Both FP and FPL on rehearing now argue strongly that the transportation gas belongs solely to the power companies and cannot be considered as part of FGT's gas supply for curtailment or any other purposes.

FP notes that in *Ft. Pierce Utility Authority et al.* v. *Florida Gas Transmission Company*, ____ FPC ____, Docket No. CP77-147, issued August 3, 1977, the Commission dismissed a complaint of the Cities that the Commission order a curtailment of the transportation gas on the FGT system to assist in meeting certain grants of extraordinary relief and that the T-3 contract volumes be curtailed proportionately with the volumes to which the direct preferred interruptible customers would otherwise be entitled. Cities also contended that all transportation gas would have to be proportionately curtailed if a new curtailment plan for FGT is ordered. The Commission said that it did not concur with Cities in curtailing the T-gas under any of the contracts because such gas is not owned by FGT and does not form a part of the system's gas supply from which gas can be allocated to its various customers. Also the Commission said it was not warranted to proportionately curtail the T-gas to provide more gas to other electric generating systems for boiler fuel use.

In its response in the present case the Florida Cities contend that the Commission in docket No. CP77-147 expressed legal conclusions and made factual determinations without record support, but Cities made no attempt to distinguish Docket No. CP77-147 from the present proceeding. In view of the Commission's conclusions in Docket No. CP77-147, we shall grant rehearing to FP and FPL on the transportation issue, revoke our joinder of them as parties, and exclude the transportation gas from the curtailment proceeding.

PROCEDURAL ISSUES

As noted above, FGT asks for clarification of the Commission's order, urging that the current curtailment plan be retained pending review of and decision on the curtailment plan to be submitted by FGT in accordance with Opinion No. 807. Lake Worth and New Smyrna Beach ask for a stay pending rehearing; and Central Florida and Maule ask for a stay pending judicial review.

Cities contend on rehearing that even if the Commission were correct that the existing curtailment plan is unduly discriminatory no substitute curtailment plan should be implemented prior to hearing. Further, the only discrimination the Commission is free to find and cure is the unlike treatment of like customers, and therefore should not require the interim implementation of an order 467-B plan but only a merger of the direct and resale interruptible classes. If the Commission does require the filing of a 467-B plan, Cities say, the Commission should require that it will be made pursuant to Section 4 and that it should not be made effective until impact data can be collected and submitted, and FGT should have total discretion when and whether to move the effectiveness of its filed tariffs after suspension by the Commission. Also the Commission should not

require the filing be made within 90 days of June 24, 1977, but should grant FGT the time necessary for its task and make clear that the plan may reflect *de facto* and *de jure* amendments to Order No. 467-B made by the Courts and the Commission.

It was the Commission's intention in Opinion No. 807 that the curtailment plan filed by FGT be made subject to a hearing to be prescribed after it is filed and not to go into effect until a final determination is made by the Commission. With this end in view the Commission called upon FGT to file a plan that could be used as a basis by the Commission along with the evidence adduced at the hearing in prescribing a new plan. However, in view of the possible argument that a curtailment plan which we required FGT to file might have to be filed under Section 4 of the Natural Gas Act[5] with the further possibility that it might become effective before the completion of a hearing and action by the Commission,[6] we shall revoke the Commission's request that FGT file a curtailment plan and direct that a hearing be held under Section 5 to provide a record on which a permanent curtailment plan can be prescribed. Since there will be no filing to become effective and any new curtailment plan, interim or permanent, will not become effective until after action by the Commission the requests for stay largely became moot or, at least, premature.

In their answers to the motions for stay the Citrus Processors, Rinker, Gardinier, Abitibi and Alumax Extrusions contend that the present plan found unduly discriminatory

[5]See *Southern Natural Gas Co.* v. *F.P.C.*, ___ F.2d ___, (CA5-1977).

[6]We are aware that FGT wants its current curtailment plan to remain in effect pending establishment of a permanent curtailment plan. It therefore, might not move under Section 4(e) to put a filed plan in effect at the end of a five-month suspension period.

should not remain in effect pending determination of a permanent end-use plan because of the burden it places upon them. We have recognized that burden in Opinion No. 807 and agree with these parties that we have authority to prescribe an interim plan. However, the record shows that under some form of 467-B plan the distributing customers purchasing I gas would receive less gas as a group and that some distributors might be subject to severe financial difficulties (See Ex. 24). To impose a 467-B plan on their system and its distributors with their heavy dependence on the industrial load without adequate consideration of its effects at a hearing would, in our opinion be reckless. Likewise we cannot properly take the half-step of requiring equal treatment of the direct preferred interruptible customers and the I customers because the record is not sufficient on the entitlements of the various customers or the impact on any but a few. Therefore, we shall not prescribe an interim plan at this time but will allow the present plan to remain in effect pending further Commission order.

FPL in its motion to reject the response of the Florida Cities notes that Section 1.34(d) of the Commission's Rules expressly provides that no answers to petitions for rehearing will be entertained by the Commission unless rehearing is granted. While FPL notes that the Commission granted rehearing, it says that this was merely a tolling order. In our opinion we should not reject Cities' filing. The Rule permits a response where rehearing is granted. While the rule provides that the response must be confined to the issues on which rehearings is granted, the order granting rehearing here did not base rehearing on any particular issues.

The Commission further finds:

(1) The assignments of error and grounds for rehearing set forth in the applications for rehearing filed herein present no

facts or legal principles which were not fully considered by the Commission when it issued Opinion No. 807 and order, or which having now been considered, warrant any change in or modification of the Commission's order except as supplemented by this Opinion and provided below.

(2) The request for clarification by FGT should be granted as provided below.

(3) The motions for stay by Central Florida, Lake Worth, and New Smyrna Beach, and Maule should be denied to the extent not granted below.

The Commission orders:

(A) The applications for rehearing and reconsideration are denied except to the extent provided below.

(B) Paragraph (A), (B) and (C) of the ordering clauses in Opinion No. 807 are deleted.

(C) A hearing shall be held under Section 5 of the Natural Gas Act upon further order of the Commission to determine a just, reasonable, non-discriminatory and non-preferential permanent curtailment plan for FGT that will be based on end-use and will provide equal treatment for direct and indirect customers making similar use of the gas. The plan shall not include consideration of the gas transported by FGT for FP and FPL. If necessary an interim plan may be prescribed before determination of a permanent plan, but FGT's present curtailment plan will remain in effect pending further action by the Commission.

(D) FGT shall on or before November 1, 1977, file a case in chief setting forth its views on the curtailment plan referred to in (B) above.

(E) The motions for stay by Central Florida, Lake Worth and New Smyrna Beach, and Maule are denied without prejudice to the extent not granted by Paragraph (B) above.

(F) Paragraph (C) of the Opinion No. 807 order joining FP and FPL is deleted.

(G) The petitions to intervene filed by FP and FPL on July 22, 1977, are dismissed without prejudice.

(H) FPL's motion to reject Cities' response is denied. By the Commission.
(S E A L)

Kenneth F. Plumb,
Secretary.

APPENDIX C-3

JURISDICTION (Transportation)
in Interstate Commerce),
TRANSPORTATION IN INTERSTATE
COMMERCE, CURTAILMENT PLAN
INTERIM CURTAILMENT (Pipeline)
DISMISSAL, REHEARING

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Charles B. Curtis, Chairman;
Don S. Smith, Georgiana Sheldon,
Matthew Holden, Jr., and George R. Hall.

Lehigh Portland Cement Company

V. Docket No. RP 75-79

Florida Gas Transmission Company

ORDER DENYING REHEARING

(Issued November 21, 1977)

On October 1, 1977, pursuant to the provisions of the Department of Energy Organization Act (DOE Act), Public Law 95-91, 91 Stat. 565 (August 4, 1977) and Executive Order No. 12009, 42 Fed. Reg. 46267 (September 15, 1977), the Federal Power Commission ceased to exist and its functions and regulatory responsibilities were transferred to the Secretary of Energy and the Federal Energy Regulatory Commission (FERC) which, as an independent commission within the Department of Energy, was activated on October 1, 1977.[1]

[1]The "Commission" when used in the context of an action taken prior to October 1, 1977, refers to the FPC; when used otherwise, the reference is to the FERC.

The "savings provisions" of Section 705(b) of the DOE Act provide that proceedings pending before the FPC on the date the DOE Act takes effect shall not be affected and that orders shall be issued in such proceedings as if the DOE Act had not been enacted. All such proceedings shall be continued and further actions shall be taken by the appropriate component of DOE now responsible for the function under the DOE Act and regulations promulgated thereunder. The functions which are the subject of this proceeding were specifically transferred to the FERC by Section 402(a) (1) or 402(a) (2) of the DOE Act.

The joint regulation adopted on October 1, 1977 by the Secretary and the FERC entitled "Transfer of Proceedings to the Secretary of Energy and the FERC," 10 CFR , provided that this proceeding would be continued before the FERC. The FERC takes action in this proceeding in accordance with the above metioned authorities.

Rinker Portland Cement Corp. and Lake Worth Utilities Authority and Utilities Commission, City of New Smyrna Beach Florida, (Lake Worth) on October 20, 1977 and Gardinier, Inc. on October 21, 1977, have filed applications for rehearing of the Commission's Opinion No. 807-A and Order issued September 22, 1977, denying rehearing in part and denying stay in part. On November 4, 1977, Florida Power & Light Company (FPL) filed a motion to reject Lake Worth's filing, and on November 15, 1977, Lake Worth filed an answer in opposition and a motion to strike portions of FPL's motion.

In its original Opinion No. 807 issued June 24, 1977, the Commission found that Florida Gas Transmission Company's (FGT) present curtailment plan was unjust, unreasonable, unduly discriminatory and preferential because it permitted industrial customers of distributing companies to be curtailed to a lesser degree than FGT's direct sale preferred interruptible customers. The Commission provided that FGT should file an

end-use type curtailment plan and that a hearing should be held. Further the opinion stated that in a general revision of FGT's curtialment plan the place of gas transported by FGT for Florida Power Corporation (FP) and FPL should be considered and that the Commission had authority over the allocation of gas not sold for resale.

However in Opinion No. 807-A on September 22, 1977, the Commission considered the arguments of some of the applicants for rehearing and took account of the situation shown by the record that an end-use plan might cause severe financial difficulties for some of the distributors and should not go into effect without consideration at a hearing. Since a filed plan might become effective under Section 4 of the Natural Gas Act before completion of the hearing and review by the Commission, it modified the order to provide that FGT file a case-in-chief rather than a curtailment plan. Also, it noted the order of the Commission in *Ft. Pierce Utility Authority, et al.*, Docket No. CP77-147, issued August 3, 1977 and excluded the question of the transportation gas from the curtailment proceeding.

Rinker, with the support of Gardinier, now argues that, having found FGT's curtailment plan unlawful, we should not delay putting a new end-use curtailment plan in effect and should not permit the present plan to be used as an interim plan. On the present record, as explained in Opinion No. 807-A, an end-use plan could cause severe financial difficulties to some distributions systems which had been built relying upon interruptible gas to serve industrial customers. On the basis of this record we are of the opinion that the present plan should remain in effect until a new end-use plan that will remove the discrimination is presented and considered by the Commission.

With respect to the transportation gas, the Commission spoke positively in its order of August 3, 1977, in *Ft. Pierce*, Docket No. CP77-147, and will not repeat what was said there. The Commission confirmed that position in its order of

September 30, 1977, in the same docket where it said that after careful consideration of the arguments requesting rehearing it concluded that "the transportation gas cannot properly be included as a part of Florida Gas' curtailment procedures."

Lake Worth referred, among other things, to *Florida Gas Transmission Company, et al.*, Docket Nos. CP65-393, *et al.*, orders issued May 2, 1977, and July 27, 1977, where the Commission permitted Amoco Production Company to deliver gas to FGT from onshore sources without restriction but required that Amoco's deliveries of offshore gas become a part of FGT's system supply and not be transported to FPL. Also they referred to *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965) where the Court upheld the Commission in taking jurisdiction over a sale of gas by a producer in Texas to El Paso Natural Gas Company to be used at compressor stations on its system, but it was agreed that a portion of the Lo-Vaca gas, commingled with other gas, would be physically sold for resale in other states. Neither of these cases dealt with the situation here. They concerned certificates and sales for delivery of gas to a pipeline; they did not involve the questions of what was the pipeline's gas supply that was subject to curtailment. Nor did they involve the question whether a certificate, here granted for the transportation of gas belonging to power companies, may be modified or conditioned so that the gas transported shall become subject to system curtailment.

FPL argues that Lake Worth's application should be dismissed because it has filed a petition for review in *Sebring Utilities Commission, et al.* v. *F.E.R.C.*, CA5, No. 77-2911. Lake Worth points out that it filed its application out of an abundance of caution and it was termed alternatively an application for rehearing *or* reconsideration. In any case the record in the *Sebring* case, after postponement, will not be filed until December 1, 1977, so that we may still act with respect to these proceedings.

Further, FPL points out that Lake Worth's application was filed 28 days after the issuance of Opinion No. 807-A on September 22, 1977. It says that under the Commission's Rules the only provision for answering an application for rehearing is limited to issues on which rehearing has been granted and must be filed withint 15 days after the issuance of the order granting rehearing (Section 1.34(d) of the Commission's Rules). Lake Worth's filing was not an answer to an application for rehearing but an application for rehearing of Opinion No. 807-A, where the Commission changed its position, and was timely under Section 19 of the Natural Gas Act because it was filed within 30 days. FPL says that it was not properly served by Lake Worth, but since FPL actually received notice it was not injured.

In its motion to strike Lake Worth points out that FPL has in Sections V and VI of its motion to reject attempted to answer Lake Worth's arguments on rehearing, and asks that these sections be stricken as in violation of Section 1.34(d) of the Rules. We agree that these portions of FPL's motion, in effect, attempt to answer Lake Worth's application for rehearing and should be stricken. See *Texas Gas Transmission Corp. et al., FERC Opinion No. 1, Docket No. CP75-295 et al.*, issued October 26, 1977.

The Commission further finds:

The applications for rehearing present no facts or principles which warrant any change in or modification of Opinion No. 807-A.

The Commission orders:

(A) The application for rehearing filed by Rinker, Gardinier, and Lake Worth and New Smyrna Beach are denied.

(B) The motion filed by FPL to dismiss Lake Worth's application for rehearing is denied.

(C) Lake Worth's motion to strike Sections V and VI of FPL's motion to dismiss is granted.

By the Commission.

(S E A L)

Kenneth F. Plumb.
Secretary

APPENDIX C-4

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

COMPLAINT CURTAILMENT

Before Commissioners: Richard L. Dunham, Chairman;
Don S. Smith, and John H. Holloman III.

Ft. Pierce Utility Authority of
the City of Ft. Pierce,
Gainesville Alachua County
Regional Electric Water and
Sewer Utilities,
Sebring Utilities Commission,
City of Homestead,
City of Kissimmee,
City of Lakeland,
City of Starke,
City of Tallahassee,
Complainants

v. Docket No. CP77-147

FLorida Gas Transmission
Company,
Florida Power & Light Company,
Florida Power Corporation,
Amoco Production Company,
Austral Oil Company, Inc.,
Defendants

ORDER DISMISSING PETITION AND COMPLAINT, GRANTING MOTIONS TO FILE RESPONSE, AND PERMITTING INTERVENTIONS

(Issued August 3, 1977)

On January 18, 1977, the Ft. Pierce Utility Authority of the City of Ft. Pierce, Gainesville-Alachua County Regional Electric Water and Sewer Utilities, Sebring Utilities Commission, and the Cities of Homestead, Kissimmee, Lakeland, Starke, and Tallahassee, Florida (Cities) filed, pursuant to Sections 1.6 and 1.7 of the Commission's Rules of Practice and Procedure (18 CFR 1.6 and 1.7) a petition and complaint that on a temporary and permanent basis (1) the Commission order a curtailment of the transportation gas on the Florida Gas Transmission Company (Florida Gas) system to assist in meeting certain grants of extraordinary relief; and (2) the Commission direct, as a condition of continued transportation, that the T-3 contract volumes be curtailed proportionately with the volumes to which the direct preferred interruptible customers would be otherwise entitled.

In response to Cities' petition and complaint, several pleadings were filed as follows: Response of Austral Oil Company Incorporated (Austral) on March 28, 1977; response of Amoco Production Company (Amoco) on March 30, 1977; and a response of Gardinier, Inc. (Gardinier), and answers by Florida Gas and Florida Power and Light Company (FPL) on March 31, 1977. On April 11, 1977, Cities filed a motion for leave to respond to Austral's response, and on April 15, 1977, a motion to allow a response to the answers of FPL, Florida Gas, and Gardinier.

Cities own and operate municipal electric systems in the State of Florida, and in 1975 had a combined generating capacity of 987.97 mw. Each of the Cities purchases natural gas from Florida Gas under a direct preferred interruptible contract, and Ft. Pierce and Starke also purchase gas for resale distribution under firm wholesale for resale contracts with Florida Gas.

FPL and Florida Power Corporation (Florida Power) are two large Florida electric public utilities that purchase gas directly from natural gas producers at the wellhead, with the gas being delivered to Florida Gas for transportation by it and redelivery to the power companies in Florida.

There are three transportation contracts between Florida Gas and the power companies. Cities' petition describes these transportation arrangements as hereinafter set forth. The first arrangement, T-1, was entered into in 1957 by Florida Gas' predecessor company and Florida Power. Florida Power buys natural gas from Sun Oil Company and Pure Oil Company at the wellhead. This gas purchase contract calls for a daily contract-quantity of 50,000 Mcf over a term of 20 years; it expires in 1979.

The T-2 contract was entered into by Florida Gas and FPL. FPL purchases gas directly from Sun Oil Company. Under the contract deliveries to FPL average 100,000 Mcf per day on terms and conditions similar to those in the T-1 contract.

The T-3 contract was entered into by Florida Gas and FPL in 1965 and provides for the interstate transportation of gas produced by Pan American Petroleum Corporation (now Amoco) and Austral. This contract specifies deliveries of the thermal equivalent of 200,000 million Btu's per day over a 20-year term, expiring in 1987.

None of the gas transported under these three contracts has been curtailed. Florida Gas transports approximately 350,000 Mcf of gas per day pursuant to these contracts. The Florida Gas curtailment plan gives the highest priority to resale firm service, while a few direct firm customers and extraordinary relief recipients have priority over interruptible gas users. Gas purchased by resale interruptible customers has priority over gas purchased directly from the pipeline by interruptible customers.

In support of their petition and complaint in which Cities urge a grant of the requested relief or, alternatively, an order to show cause, Cities *inter alia* content that: (1) Florida Gas' failure to deliver natural gas in the quantities contracted for has had a serious and adverse effect upon them, including a need to purchase oil at approximately three times the price of gas; (2) there is not sufficient legal or equitable justification for continuing the T-3 arrangement because Florida Gas purportedly relinquished gas rights under its warranty contract with Amoco in negotiating the T-3 contract; (3) all T-gas, including that under the T-1 and T-2 contracts, would have to be proportionately curtailed if a new curtailment plan for Florida Gas is ordered; (4) the transportation contracts should bear their fair share of curtailments attributable to extraordinary relief orders in accordance with the court's holding in *Ft. Pierce Utility Authority of the City of Ft. Pierce, et al.* v. *FPC*, 526 F. 2d 993 (CA5, 1976); (5) because of its control over transportation, *F.P.C.* v. *Louisian Power & Light Company*, 406 U.S. 621 (1972), the Commission has the jurisdiction to make continued transportation of gas by Florida Gas conditional upon its agreement to curtail such gas; and (6) the T-3 gas should be curtailed on the same basis as direct preferred interruptible gas because of analogous use characteristics, the impact upon independent electric systems otherwise, and the consummation of the T-3 contract at the price of Florida Gas' attempted sacrifice of obligations to its customers.

In its answer, Florida Gas urges, among other things, that: (1) Its current curtailment plan is applicable only to natural gas volumes owned and sold by Florida Gas; (2) the transportation contracts for the T-gas involved state that such transportation shall be on a firm basis and not subject to interruption or curtailment except for reasons of *force majeure* or operating conditions; (3) neither the *Louisiana Power & light* nor *Ft. Pierce* cases *supra* support the proposition that gas owned by others and transported on a firm basis can be curtailed and diverted for the

benefit of interruptible customers; (4) in Opinion No. 778-A, *Transcontinental Gas Pipe Line Corporation*, issued December 8, 1976, the Commission rejected proposed curtailment of certain gas owned by producers but transported by Transcontinental Gas Pipe Line Corporation (Transco); and (5) Cities' allegations that Florida Gas acted in bad faith and improperly administered its warranty contract with Amoco are not true and are irrelevant herein.

In addition to Florida Gas, Amoco, FPL, Austral, and Gardinier responded to Cities' petition and complaint. Amoco disagrees with Cities' allegations concerning delivery specifications in its contract with FPL and the "secret" nature of a March 22, 1967, letter from Florida Gas to Amoco. FPL contends that it is not a natural gas company subject to Commission jurisdiction under the Act; the *Louisiana Power and Light* case involved curtailment of direct sale gas owned by the pipeline, not transportation gas owned by others; and the Commission should dismiss Cities' complaint as a matter of policy. Austral denies entering into a warranty contract with Florida Gas or that it has failed to comply with its obligations under any contract. Gardinier argues that none of Cities' contract rights has been altered by Commission orders granting extraordinary relief and that matters such as the "secret letter" from Florida Gas to Amoco are irrelevant.

In responses that they requested permission to file, Cities maintain that: (1) Austral's obligations herein arise from a contract between Amoco (formerly Pan American Petroleum Corp.), Austral and Florida Gas dated November 20, 1964, for the sale of natural gas by Amoco and Austral to Florida Gas; (2) pursuant to *Louisiana Power and Light* and *California* v. *Lo-Vaca Gathering Company*, 379 U.S. 366 (1965), the Commission is empowered to curtail the gas here involved under its transportation jurisdiction; and (3) the *Transco* case *supra* did not involve any sale but only the transportation of natural gas owned by producers to the producers' own refineries.

Notice of the petition and complaint was published in the *Federal Register*, requiring that notices and petitions to intervene be filed on or before March 31, 1977. Timely petitions for leave to intervene were filed by Abitibi Corporation, Gardinier, Lake Worth Utilities Authority, Southern Gas Company, Division of Donovan Companies, Inc., and Sun Oil Company. In addition to a late notice of intervention by the State of Louisiana, petitions for leave to intervene out-of-time were filed by the Gainesville Gas Company, Gulf Natural Gas Corporation, and Rinker Portland Cement Corp. (together with comments). Petitioners seek to protect their interests, and no objections to their intervention have been received although Cities lack knowledge as to why the State of Louisiana seeks intervention.

In view of our recent action in Opinion No. 807, *Lehigh Portland Cement Company* v. *Florida Gas Transmission Company*, issued June 24, 1977, requiring Florida Gas to file a new curtailment plan, Cities' request apparently now extends to the curtailment of all the transportation gas under the T-1, T-2 and T-3 contracts. However, we do not concur with Cities in curtailing the T-gas under any of the contracts because such gas is not owned by Florida Gas and does not form a part of the system's gas supply from which gas can be allocated to its various customers.

Although the transportation gas flows through Florida Gas' pipeline, it already has been purchased by FPL and Florida Power prior to its transportation by Florida Gas to points of destination in Florida. Since legal title to the gas has vested in the two power companies prior to its interstate transportation, we do not believe that the *Louisiana Power and Light* and *LoVaca Gathering Company* cases are applicable herein for purposes of Cities' request. Nor do we believe that Cities have sufficiently distinguished the *Transco* case in which we held that volumes transported by Transco for certain producers are not part of Transco's gas supply and thus are not subject to its curtailment

plan except in the event of pipeline failure or *force majeure*. Opinion No. 778-A, Slip at 18.

With respect to Cities' proposal to condition previously granted certificate authorization upon proportionate curtailment of the T-gas as a condition of continued transportation, we do not find such action to be warranted in order to provide more gas to other electric generating systems for boiler fuel usage. Cf. *Florida Gas Transmission Company, et al.*, Docket Nos. CP65-393, *et al.*, issued May 2, 1977, Slip at 8-9; *Alabama-Tennessee Natural Gas Company*, 48 FPC 1071, 1077-1078 (1972). Therefore, we shall dismiss Cities' petition and complaint.

The Commission finds:

(1) It is necessary and appropriate in carrying out the provisions of the Natural Gas Act that Cities' petition and complaint be dismissed.

(2) Participation by the above-named petitioners in this proceeding may be in the public interest, and good cause exists to grant their petitions for leave to intervene.

The Commission orders:

(A) The petition and complaint filed by Cities on January 18, 1977, is hereby dismissed.

(B) Cities' motions for leave to file response to response of Austral filed on April 11, 1977, and to answers of FPL, Florida Gas, and Gardinier filed on April 15, 1977, are granted.

(C) The above-named petitioners are permitted to intervene in this proceeding subject to the Rules and Regulations of the Commission: *Provided, however,* that the participation of such intervenors shall be limited to matters affecting asserted rights

and interests as specifically set forth in said petitions for leave to intervene; and *Provided, further,* that the admission of such intervenors shall not be construed as recognition by the Commission that they or any of them might be aggrieved because of any order or orders of the Commission entered in this proceeding.

By the Commission

(SEAL)

Kenneth F. Plumb,
Secretary.

APPENDIX C-5

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

APPLICATION FOR REHEARING DENIED
CURTAILMENT

Before Commissioners: Charles B. Curtis, Chairman;
Don S. Smith, and Georgiana Sheldon.

Ft. Pierce Utility Authority of
the City of Ft. Pierce,
Gainesville Alachua County
Regional Electric Water and Sewer Utilities,
Sebring Utilities Commission,
City of Homestead,
City of Kissimmee,
City of Lakeland,
City of Starke,
City of Tallahassee,
Complainants

v. Docket No. CP77-147

Florida Gas Transmission
Company,
Florida Power & Light Company,
Florida Powr Corporation,
Amoco Production Company,
Austral Oil Company, Inc.
Defendants

ORDER DENYING APPLICATIONS FOR REHEARING AND DENYING IN PART MOTION FOR CLARIFICATION

(Issued September 30, 1977)

Two applications for rehearing have been filed with respect to the Commission's order issued August 3, 1977, in the above entitled proceeding dismissing a petition and complaint filed on January 18, 1977[1], by the Ft. Pierce Utility Authority of the City of Ft. Pierce, Gainesville-Alachua County Regional Electric Water and Sewer Utilities, Sebring Utilities Commission, and the Cities of Homestead, Kissimmee, Lakeland, Starke, and Tallahassee, Florida (Cities). On September 2, 1977, an application for rehearing was filed by Cities, and a motion for clarification or, in the alternative, application for rehearing by Lake Worth Utilities Authority (Lake Worth). On September 19, 1977, Florida Power and Light Company (FPL) filed an answer to Lake Worth's motion for clarification.

In their application for rehearing, Cities urge, *inter alia*, that: (1) The Commission's dismissal of their complaint bestows upon FPL, Florida's largest electric utility, a continuing right to receive low-priced natural gas free from curtailments in contrast to substantial continuing curtailments of the gas allocated to smaller competing utilities by Florida Gas Transmission Company (Florida Gas); (2) this Commission's regulatory powers with respect to curtailment are based upon its jurisdiction over the transportation of natural gas; (3) the Commission's summary dismissal of Cities' petition and complaint without hearing is unjustified; (4) the Commission under appropriate circumstances is authorized to reopen and condition previously

[1]By letter filed September 1, 1977, the complaint was amended to delete all references to a letter of March 22, 1967, from Florida Gas Transmission Company to Amoco Production Company.

granted certificates such as those empowering Florida Gas to transport the gas under the T-1, T-2, and T-3 arrangements for FPL and Florida Power Corporation (Florida Power); (5) a favorable ruling upon Cities' complaint herein would be consonant withe the Commission's order issued May 2, 1977, in *Florida Gas Transmission Company*, Docket Nos. CP65-393, *et. al.*, wherein the Commission granted certificates allowing more on-shore gas to be sold to boiler fuel users on the Florida Gas system, including Cities and FPL, and more off-shore gas to be sold to Florida Gas but not to FPL; (6) the Commission issued a show cause order on May 16, 1975, in Docket No. CP65-393, *et al*, raising the question of whether the T-3 certificate should be "continued, limited, or amended" although it subsequently terminated that proceeding in an order of October 8, 1976; (7) the Commission's order dismissing Cities' complaint is entirely inconsistent with its holding in Opinion No. 807, *Lehigh Portland Cement Company, Complainant* v. *Florida Gas Transmission Company, Respondent*, issued June 24, 1977, and the Commission cannot properly ignore the clearly discriminatory situation herein; (8) Cities' available alternative to natural gas for generating electricity is inordinately expensive; and (9) discovery techniques might disclose knowledge by FPL of the substance of a March 22, 1967, letter from Florida Gas to Amoco Production Company (Amoco) and secret arrangements reducing gas deliveries to Florida Gas but preserving those to FPL, in which case FPL must forfeit any claim to continued preferential treatment regarding natural gas deliveries and curtailments.

In its motion for clarification and, alternatively, application for rehearing, Lake Worth seeks clarification of the statement disclaiming curtailment jurisdiction over the transportation gas here involved on page 5 of the order of August 3, 1977, to make it consistent with the jurisdictional conclusions reached in *Lehigh Portland Cement supra* and cited in subsequent Commission orders. Lake Worth also alleges that the order of August 3, 1977,

conflicts in this regard with the Supreme Court's holding that curtailment plans are aspects of this Commission's transportation jurisdiction in *F.P.C.* v. *Louisiana Power & Light Company*, 406 U.S. 621 (1972) and with the decision of the Court of Appeals for the Fifth Circuit in *Fort Pierce Utility Authority of the City of Port Pierce* v. *F.P.C.*, 526 F.2d 993 (CA5, 1976) wherein the Commission did not disclaim authority to order transportation gas to be included in a curtailment program.

The main thrust of the applications for rehearing by Cities and Lake Worth is directed toward the asserted inconsistency of the August 3, 1977 order's dismissal of Cities' complaint with our conclusion in Opinion No. 807 in *Lehigh Portland Cement* that the place of transportation gas should be considered in revising Florida Gas' curtailment plan and all parties should be allowed to present evidence on this issue. After careful consideration of the arguments requesting rehearing on this issue in that case, we have concluded, however, that the transportation gas cannot properly be included as a part of Florida Gas' curtailment procedures. Opinion No. 807-A, issued September 22, 1977. That determination was predicated essentially upon the same reasons set forth in our order of August 3, 1977 herein; i.e., the transportation gas, though flowing through Florida Gas' pipeline, already has been purchased by FPL and Florida Power prior to its transportation by Florida Gas to Florida destination points. Therefore, the gas transported under the T-1, T-2 and T-3 contracts is not owned by Florida Gas and does not comprise part of its system gas supply that can be allocated to its customers. CF. Opinion No. 778-A, *Transcontinental Gas Pipe Line Corporation*, Slip at 18.

We believe that our conclusions herein are entirely consistent with the Supreme Court's holding in *Louisiana Power & Light supra* that curtailment plans are aspects of our transportation jurisdiction because the gas being transported for FPL and Florida Power is not owned by Florida Gas. Nor do we

perceive any conflict with the Fifth Circuit's recent decision in the *Fort Pierce* case *supra*, wherein the court affirmed our refusal to decide the issue of "transported gas" in the context of certain extraordinary relief proceedings. Although the court was advised that the issue of "transported gas" could properly be raised by the filing of a complaint pursuant to Section 1.6 of the Commission's Rules of Practice and Procedure, it is a *non sequitur* to assume that such was tantamount to our concurrence with contentions that the transportation gas here involved should be made subject to general system curtailment. We are still free to differ with contentions made by parties in a complaint, and we do not agree in this instance for the reasons set forth herein and in our aforesaid August 3 order.

We are in accord with Cities' claim tht we have authority to reopen and condition previously granted certificates under appropriate circumstances. In fact, we did issue, as pointed out by Cities, an order to show cause in *Florida Gas Transmission Company, et al.*, Docket Nos. CP65-393 *et al.*, raising the question of whether the T-3 certificate should be continued or modified, but we subsequently decided to terminate the show cause proceeding since we found its continuance not to be appropriate at that time.

Our jurisdiction to reopen proceeding in order to modify or condition certificates already issued notwithstanding, we do not wish to limit or amend previously granted authorizations without a clear and convincing showing that such is warranted. We are not persuaded that such a showing has been made in regard to the considered transportation certificates. While there is merit in Cities' argument that if this transportation gas were made subject to Florida Gas' curtailment procedures, a smaller amount would be utilized as boiler fuel, it appears that a substantial portion of the gas nevertheless would be used as boiler fuel for industrial purposes or for generating electric energy by other electric systems such as Cities. In these circumstances we are of the view

that a modification of these authorizations which would substitute, in large measure, other boiler fuel users such as industrial and other electric system customers of Florida Gas for FPL and Florida Power would not justify reopening previously granted certificates.

Our actions of May 2, 1977 and July 27, 1977, in Docket Nos. CP65-393 *et al.* in granting certificates to Amoco and certain pipelines to exchange and transport natural gas were taken in proceedings that occupy a different posture from the instant one. Therein we imposed a condition in the certificates relating to offshore gas that would restrict deliveries to Florida Gas to satisfaction of the Amoco-Florida Gas warranty sale only with none of these authorizations, however, involved only applications for new certificate authority rather than modification of certificates already issued.

The Commission finds:

The assignments of error and grounds for rehearing of the Commission's order of August 3, 1977, in the applications for rehearing filed by Cities and Lake Worth present no new facts or legal principles which were not considered in the order issued August 3, 1977, or which, having now been considered, warrant any change or modification of that order.

The Commission orders:

(A) Except to the extent set forth above, the motion for clarification filed on September 2, 1977, by Lake Worth is denied.

(B) The applications for rehearing filed on September 2, 1977, by Cities and Lake Worth are hereby denied.

By the Commission.

(S E A L)

Kenneth F. Plumb,
Secretary.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served copies of this Petition for Writ of Certiorari in accordance with Rule 31 and 33 of the Supreme Court of the United States.

ROBERT A. JABLON

June 18, 1979

No. 78-1878

In the Supreme Court of the United States

OCTOBER TERM, 1978

SEBRING UTILITIES COMMISSION, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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INDEX

CITATIONS

Cases:

Page

Cases—(Continued):

Statutes:

Page

Statutes—(Continued):

Miscellaneous:

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BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A)[1] is reported at 591 F. 2d 1003. The opinions and orders of the Federal Power Commission[2] (Pet. Apps. C-1, C-2, C-3, C-4, and C-5) are not reported.

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[1]Unless otherwise indicated, all citations herein to the actions of the court of appeals and the Federal Energy Regulatory Commission will be to the appendices to the petition, cited as "Pet. App."

[2]Pursuant to the provisions of the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (to be codified as 42 U.S.C. 7101 *et seq.*), the Federal Power Commission ceased to exist on September 30, 1977, and most of its functions and regulatory responsibilities, including those relevant to this case, were assumed by the Federal Energy Regulatory Commission effective October 1, 1977. Hereinafter, the term "Commission" refers to the FPC or the FERC depending on whether the events referred to occurred before or after October 1, 1977.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1979. The petition for a writ of certiorari was filed on June 18, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Commission has authority under Section 1(b) of the Natural Gas Act, 15 U.S.C. 717(b), to order that natural gas which a pipeline transports for others but does not itself own be included in the pipeline's plan for curtailing deliveries to its customers in time of shortage.

2. Whether allegations of anticompetitive impact can confer upon the Commission authority, which it otherwise lacks, to order that gas transported but not owned by a pipeline be included in that pipeline's curtailment plan.

STATUTE INVOLVED

Section 1(b) of the Natural Gas Act, 15 U.S.C. 717(b), is set forth on page 3 of the petition.

STATEMENT

Florida Gas Transmission Company ("FGT") owns and operates a natural gas pipeline for the transportation of gas from the Gulf states to Florida pursuant to a certificate of public convenience and necessity issued by the Commission to FGT's predecessors-in-interest in 1956 (Pet. App. A-44). Under two types of rate schedules, providing for firm and interruptible gas service, FGT sells its gas to distribution companies which resell it (*ibid.*). FGT also makes direct sales (*i.e.*, sales not for resale) of gas it owns to industrial customers which also may purchase either interruptible or firm service (*ibid.*). The

petitioners ("Florida Cities") are municipal electric systems in the State of Florida and are all direct sale customers of FGT under interruptible contracts (Pet. App. A-88); two of the petitioners, the Fort Pierce Utilities Authority and the City of Starke, also purchase gas from FGT for resale under firm wholesale contracts with FGT (*ibid.*).

In addition, FGT transports gas owned by two electric utilities, Florida Power Corporation ("FP") and Florida Power and Light Company ("FPL"), both of which buy gas for their own use directly from natural gas producers at the wellhead in Texas (Pet. App. A-89).[3] Legal title to this "transportation gas" passes to the two electric utilities prior to its transportation by FGT (Pet. App. A-92).

Since it began operations in 1956, FGT has operated pursuant to a curtailment plan on file with the Commission (Pet. App. A-44). This tariff established a priority scheme for curtailing gas deliveries to FGT's direct sale and wholesale customers in time of gas shortages (*ibid.*).[4] None of the transportation gas owned by FP and FPL was curtailed under this plan (Pet. App. A-89).

In 1975, one of FGT's direct sale industrial customers, Lehigh Portland Cement Company, complained to the Commission under Section 5(a) of the Natural Gas Act, 15 U.S.C. 717d(a), that FGT's curtailment plan unlawfully discriminated against direct sale industrial customers in

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[3]FGT transports this gas under its transportation rate schedules T-1, T-2, and T-3, which are on file with the Commission (Pet. App. A-89).

[4]Under FGT's curtailment tariff, the company curtailed deliveries to its customers in the following order: (1) direct interruptible customers, (2) resale interruptible customers, (3) direct firm customers, resale firm customers, and transportation gas (Pet. App. A-44).

favor of otherwise similarly situated industrial users purchasing from FGT's distribution customers (Pet. App. A-42).[5] Florida Cities, which had intervened in opposition to the complaint, contended that if FGT's curtailment plan had to be revised, curtailments of the transportation gas volumes should be included (Pet. App. A-62). Subsequently, Florida Cities filed a complaint in a separate proceeding[6] requesting that the Commission (1) order curtailments of the transportation gas on FGT's system, and (2) condition further transportation upon curtailment of the transportation gas in accordance with the curtailment applicable to direct interruptible customers (Pet. App. A-88).

In Opinion No. 807, the Commission in the Lehigh Portland Cement Company proceeding (Pet. App. A-39 to A-63) found FGT's curtailment plan to be unduly discriminatory and ordered the company to file a new tariff that would provide equal treatment to direct and indirect customers who made similar end-uses of the gas (Pet. App. A-62 to A-63). In addition, the Commission ordered that gas transported by FGT for FP and FPL be considered in the formulation of the new curtailment plan (Pet. App. A-62).

Thereafter, in the Florida Cities' separate complaint proceeding, the Commission dismissed the complaint requesting curtailment of the transportation gas on the ground that such gas "is not owned by [FGT] and does not form a part of the system's gas supply from which gas can be allocated to its various customers" (Pet. App. A-92). On rehearing of Opinion No. 807, the Commission

[5]FPC Docket No. RP75-79.

[6]FPC Docket No. CP77-147.

corrected the inconsistency between its orders in these two related proceedings and reversed its prior decision which had included the FP and FPL transportation gas in any new curtailment plan (Pet. App. A-74 to A-75).[7]

Upon review of the Commission's orders in both proceedings, the court of appeals affirmed (Pet. App. A-1 to A-35). The court rejected Florida Cities' argument that Section 1 of the Natural Gas Act, 15 U.S.C. 717, authorizes the Commission to curtail any gas that is transported in interstate commerce, regardless of who owns it (Pet. App. A-28 to A-34). The court held that "because FGT never owned the [transportation] gas, it could not be compelled to allocate it to others. The transportation gas has never been a part of the supply available to FGT for satisfaction of its sales contracts. We see no authority for making it so now" (Pet. App. A-34). In so ruling, the court distinguished *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972), and *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965), on the ground that neither case had upheld Commission jurisdiction over gas not owned by a jurisdictional pipeline (Pet. App. A-30 to A-32). The court further held that allegations of anticompetitive effects do not alone confer jurisdiction over natural gas (Pet. App. A-35).[8]

ARGUMENT

The court of appeals correctly sustained the Commission's determination that it lacks authority to order that natural gas transported but not owned by a pipeline

[7]It also affirmed its previous finding that FGT's curtailment plan was no longer just and reasonable, but allowed the existing plan to remain in effect pending further Commission action (Pet. App. A-76 to A-78).

[8]The court also sustained the Commission's finding that FGT's curtailment plan was unduly discriminatory (Pet. App. A-12 to A-28).

be included in the pipeline's plan for curtailing deliveries to its customers in time of shortage. The court also correctly ruled that petitioners' assertion of anti-competitive effect cannot serve to vest in the Commission authority it does not otherwise possess to order that transportation gas be included in a pipeline's curtailment plan. The decision below does not conflict with any decisions of this Court, nor is there any conflict among the circuits. Accordingly, review by this Court is not warranted.

1. Petitioners' contention (Pet. 11-18) that the jurisdictional holdings of the Commission and the court of appeals are contrary to *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972); *California* v. *Southland Royalty Co.*, 436 U.S. 519 (1978); and *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965), is incorrect. The court of appeals properly declined to extend this Court's holdings in those cases to allow the Commission to order curtailment of gas not owned but merely transported by a natural gas pipeline.

In *Louisiana Power & Light Co.*, *supra*, the Commission had imposed an interim curtailment plan covering both direct and resale customers buying gas owned by the United Gas Pipe Line Company. The issue before the Court was "whether FPC has authority to effect orderly curtailment plans involving both direct sales and sales for resale." 406 U.S. at 631. The Court rejected the direct sales customers' argument that their sales were not jurisdictional and therefore could not be curtailed, holding that "the [Natural Gas] Act applies to interstate 'transportation' regardless of whether the gas transported is ultimately sold retail or wholesale." *Id.* at 636.

The court of appeals correctly distinguished *Louisiana Power & Light Co.* from the case at bar. As the court below observed: "The Supreme Court dealt only with the issue of whether the Commission could, independently of its sales jurisdiction, supervise curtailment of gas owned by a natural gas company" (Pet. App. A-30; footnote omitted). The transportation gas at issue here is owned by FP and FPL both prior to delivery to FGT and throughout the period of transportation (Pet. App. A-89 to A-92). FGT, which as the court of appeals held, "stands in the position of a bailee in relation to FP and FPL" (Pet. App. A-34), cannot sell the transportation gas to its customers; in contrast, the pipeline in *Louisiana Power & Light Co.* owned and could sell all of the direct sale and resale gas which the Court held to be subject to curtailment. The court of appeals thus properly refused to "extend the Court's holding [in *Louisiana Power & Light Co.*] to allow Commission-ordered allocation of gas owned by two companies that are not subject to Commission jurisdiction" (Pet. App. A-31).[9]

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[9]The court of appeals' holding is supported by the interpretation of *Louisiana Power & Light Co.* in *American Public Gas Association* v. *FERC*, 587 F. 2d 1089 (D.C. Cir. 1978). In its Order No. 533, *Policy with Respect to Certification of Pipeline Transportation Agreements*, the Commission had determined that, due to curtailments of relatively high-priority customers on many pipelines, it would under certain conditions certificate transportation arrangements involving sales of gas directly from producers to such high-priority users. On review, the court rejected an assertion that *Louisiana Power & Light Co.* required the Commission to include such transportation gas in curtailment plans (587 F. 2d at 1097-1098; emphasis in origial):

> [W]e do not believe that unlawful discrimination inheres in the fact that direct sale purchases are beyond the scope of pipeline curtailment plans. [Petitioner] is quite correct in observing that curtailment plans represent an exercise of the Commission's transportation jurisdiction rather that its rate jurisdiction. *See Federal Power Commission* v. *Louisiana Power & Light Co.*,

Petitioners' contention (Pet. 15) that *California* v. *Southland Royalty Co., supra,* undermines the court of appeals' decision is similarly without merit. *Southland* held that once gas has been dedicated under the Natural Gas Act to interstate commerce pursuant to a certificate of unlimited duration authorizing the sale and delivery of gas from a tract leased by the seller, "even expiration of the lease did not terminate the obligation to continue selling the gas in interstate commerce." *United Gas Pipe Line Co.* v. *McCombs*, No. 78-17 (June 18, 1979), slip op. 8. Rather, the Commission's permission to abandon the sale and service covered by the dedication must first be obtained. *Ibid.* The present case, however, does not involve abandonment of the continued sale and delivery of dedicated gas. A certificate limited to the transportation of gas purchased directly by the user does not effectuate a dedication of that gas within the meaning of *Southland* or Sections 1(b) and 7(b) of the Natural Gas Act, 15 U.S.C. 717(b) and 717f(b). "[T]hroughout the Act, 'transportation' and 'sale' are viewed as separate subjects of regulations." *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464, 468 (1950). See also *FPC* v. *Louisiana Power & Light Co., supra,* 406 U.S. at 637 n.13.[10]

406 U.S. 621, 641 * * * (1972). Nevertheless, the purpose of a curtailment plan is to prescribe the manner in which a pipeline that cannot meet its contractual commitments will curtail deliveries on its *own* gas.

Congress has recently confirmed the Commission's authority to certificate the transportation of user-owned gas for high-priority uses. See Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, Section 608, 92 Stat. 3173, discussed in note 12, *infra.*

[10]Under Section 2(18)(B)(i)(IV) of the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3354, the term "committed or dedicated to interstate commerce" does not include "natural gas sold in interstate commerce (within the meaning of the Natural Gas Act) * * * to the user by the producer and transported under any certificate, granted pursuant to section 7(c) of the Natural Gas Act, if such certificate was specifically granted for the transportation of that natural gas for such user."

Thus, this Court's holding in *Southland* that the Commission's authority over dedication and abandonment survives the expiration of the underlying private agreement is not controlling here, as the court of appeals held (Pet. App. A-34 n.57). Nothing in *Southland* empowers the Commission to order that FGT's customers be allocated gas that FGT does not own and could not otherwise sell to them.

Petitioners' reliance (Pet. 16-18) on *California* v. *Lo-Vaca Gathering Co., supra,* is also misplaced. That case involved purchases of gas by the El Paso Natural Gas Company from the Lo-Vaca Gathering Company and the Houston Pipe Line Company. The gas purchased from Lo-Vaca and Houston was limited by contract to El Paso's own nonjurisdictional use. Nevertheless, because these volumes of gas were commingled into a single stream, and thus at least a portion of this gas was in fact resold in interstate commerce, the Court held that the Commission had properly asserted rate jurisdiction over the entire amount purchased by El Paso.

As the court of appeals recognized (Pet. App. A-31), this Court in *Lo-Vaca* did not adopt a flat rule that commingling, by itself, establishes Commission jurisdiction for all regulatory purposes over all gas in an interstate pipeline. That issue was expressly reserved.[11] Rather, the Court was considering a jurisdictional pipeline that commingled jurisdictional and nonjurisdictional gas it owned and then sold for resale in interstate commerce a part of that commingled gas. Under these

[11]The Court noted (379 U.S. at 370; footnote omitted):

Whether cases could be conjured up where in spite of original commingling there might be a separate so-called nonjurisdictional transaction of a precise amount of gas not-for-resale within the meaning of the Act is a question we need not reach.

circumstances the Court refused to preclude Commission authority over the gas that was contractually designated for nonjurisdictional use, for to have done so would have enabled jurisdictional pipelines to discriminate in favor of their nonjurisdictional customers and to have insulated favored suppliers from federal regulation by attributing their gas to nonjurisdictional uses. 379 U.S. at 369-370. No such power of discrimination or attribution over gas owned by an interstate pipeline is involved here and the effective regulation of resale gas is not impaired. In addition, the transportation gas in the present case is owned by the two electric utilities, which are not natural gas companies under the Natural Gas Act. Thus, none of the factors relied on by the Court in *Lo-Vaca* is present. Accord, *American Public Gas Association* v. *FERC*, 587 F. 2d 1089, 1097 n.9 (D.C. Cir. 1978).

Petitioners are also in error in their contention that "[a]cceptance of [the court of appeals'] distinction would give parties the ability to contract out of FERC's regulatory jurisdiction, thereby creating the 'attractive gap' that this Court has stated many times the Act is intended to avoid" (Pet. 15). Petitioners fail to recognize that the extent to which users of gas purchase their own supplies at the wellhead, rather than from interstate pipelines, is a function of many factors beyond the control of the purchasers, including supply, price, and the cost of transportation. Petitioners also ignore that the rates for the transportation service are regulated by the Commission pursuant to Section 4(a) of the Natural Gas Act, 15 U.S.C. 717c(a). But, most importantly, petitioners overlook that the pipeline must obtain Commission

authorization under a standard of public convenience and necessity in order to transport the gas the user has purchased.[12]

The Commission has construed the Natural Gas Act, which it is charged to administer, as not conferring jurisdiction to order the curtailment of natural gas transported but not owned by a pipeline.[13] In the

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[12]Pursuant to Section 7(c) of the Natural Gas Act, 15 U.S.C. 717f(c), the Commission has twice issued certificates of public convenience and necessity permitting FGT to transport gas to FP and FPL. See *Houston Texas Gas & Oil Corporation*, 16 F.P.C. 118 (1956), aff'd *sub nom. Florida Economic Advisory Council* v. *FPC*, 251 F. 2d 643 (D.C. Cir. 1957), cert. denied, 356 U.S. 959 (1958), and *Florida Gas Transmission Company*, 37 F.P.C. 424 (1967).

Although the Commission does not have authority to require that a pipeline include in its curtailment plan transportation gas owned by others, it may grant future transportation certificates on the condition that such gas not be put to low-priority uses. *Florida Power & Light Company* v. *FERC*, 598 F. 2d 370 (5th Cir. 1979). In this way, notwithstanding any underlying private arrangements, the Commission retains the power to adjust proposed end-uses of transportation gas in accordance with the priorities established as appropriate to the limits on the available gas supply. The Commission's authority in this regard has recently been confirmed by Congress in Section 608 of the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3173, which amended Section 7(c) of the Natural Gas Act to provide that "[t]he Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of—(A) natural gas sold by the producer to such person; and (B) natural gas produced by such person." See also H.R. Conf. Rep. No. 95-1750, 95th Cong., 2d Sess. 118-119 (1978).

[13]In Section 303(d) of the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3385, Congress has given authority to the President, in certain extraordinary situations, to allocate user-owned natural gas. Such a recent and explicit authorization of emergency presidential powers to allocate user-owned natural gas is at odds with petitioners' contention here that there is general authority in the Commission to order curtailment of such gas.

Commission's view, its power to grant transportation certificates for the public convenience and necessity is adequate regulatory authority to promote the objectives of the Act in this respect. Petitioners' arguments to the contrary do not overcome the deference properly due an agency's considered interpretation of its own enabling legislation. See, *e.g.*, *New York Department of Social Services* v. *Dublino*, 413 U.S. 405, 420 (1973); *Investment Company Institute* v. *Camp*, 401 U.S. 617, 626-627 (1971); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

2. There is no basis for petitioners' alternative claim (Pet. 20) that their allegations of anticompetitive consequences are a sufficient predicate for the Commission to assert curtailment powers over transportation gas. Competitive considerations, where relevant, are to be appraised in "[t]he exercise by the Commission of powers *otherwise* within its jurisdiction * * *." *FPC* v. *Conway Corp.*, 426 U.S. 271, 279 (1976) (emphasis added). Cf. *Gulf States Utilities Co.* v. *FPC*, 411 U.S. 747, 758-759 (1973). Thus, the court of appeals correctly concluded (Pet. App. A-35 n.58):

> Although the FERC has a responsibility to consider anticompetitive impact in matters properly before it * * *, alleged anticompetitive effect, in and of itself, does not create jurisdiction over natural gas.

See also *Northern California Power Agency* v. *FPC*, 514 F 2d 184, 189 (D.C. Cir.), cert. denied, 423 U.S. 863 (1975).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1878

THE SEBRING UTILITES COMMISSION, THE FORT PIERCE UTILITIES AUTHORITY OF THE CITY OF FORT PIERCE, THE GAINESVILLE-ALACHUA COUNTY REGIONAL ELECTRIC WATER & SEWER UTILITIES, and the CITIES OF HOMESTEAD, KISSIMMEE, LAKELAND, STARKE and TALLAHASSEE, FLORIDA,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR FLORIDA POWER & LIGHT COMPANY IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF CITATIONS

COURT CASES:

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BRIEF FOR FLORIDA POWER & LIGHT COMPANY IN OPPOSITION

Florida Power & Light Company (FP&L), an intervenor in support of respondent Federal Energy Regulatory Commission below, submits this brief in opposition to the Petition for Writ of Certiorari to review the judgment entered in this case on March 20, 1979.

OPINIONS BELOW

An adequate reference to the opinions delivered in the Court of Appeals below and in the Federal Energy Regulatory Commission (or its predecessor agency the Federal Power Commission) [1] is made in the Petition. The opinion of the Court below has now been reported. *Sebring Utilities Commission et al.* v. *FERC,* 591 F.2d 1003 (5th Cir. 1979).

JURISDICTION

The jurisdictional requisites are set forth in the Petition.

QUESTION PRESENTED

It is respectfully submitted that the following question, rather than the questions urged by the Petitioners, is the only one correctly presented here in light of the opinion of the Court of Appeals (Petition Appendix A, pp. A-28 to A-35):

Whether the Court of Appeals correctly held that the Commission has no jurisdiction to curtail natural gas transported by an interstate pipeline company but not owned by the interstate pipeline company?

STATUTE INVOLVED

The statutory provisions involved are adequately set forth in the Petition.

COUNTERSTATEMENT OF THE CASE

Florida Power & Light Company (FP&L) is an electric generating, transmission and distribution company,

[1] These agencies are sometimes hereinafter referred to as the "Commission", or "FERC" or "FPC", where appropriate.

operating entirely within the State of Florida, which makes a nonjurisdictional purchase of approximately 200,000 Mcf per day of natural gas to produce electric energy from Amoco Production Company (Amoco) in Louisiana under a general corporate warranty contract. FP&L consumes all its gas in its electric generation facilities in Florida. Therefore, the sale by Amoco is not subject to the Commission's jurisdiction under the Natural Gas Act because it is not a sale for resale. Amoco delivers FP&L's gas to Florida Gas Transmission Company's (Florida Gas) interstate pipeline in Louisiana for transportation to FP&L in Florida under Florida Gas' T-3 Transportation Rate Schedule. This transportation service rendered by Florida Gas is jurisdictional under the Natural Gas Act and was certificated by the FPC. *Florida Gas Transmission Company,* 37 F.P.C. 424, modified at 993 (1967). The Commission's certificate order specifically ruled that the sale from Amoco to FP&L was nonjurisdictional. 37 F.P.C. 427-443. The T-3 service will expire pursuant to its terms in June of 1988.

Two earlier similar arrangements were implemented for the nonjurisdictional purchase of natural gas in Texas from Sun Oil Company by FP&L and by Florida Power Corporation (Power Corporation), and this natural gas was transported to Florida by Florida Gas under the jurisdictional T-1 and T-2 transportation services. *Houston Texas Gas & Oil Corporation, et al.,* 16 F.P.C. 118 (1956), affirmed *sub nom Florida Economic Advisory Council* v. *FPC.,* 251 F.2d 643 (1957), *cert. denied,* 356 U.S. 959 (1958).[2]

[2] Houston Texas Gas & Oil Corporation and Coastal Transmission Corporation were the corporate predecessors of Florida Gas.

In this proceeding, the Commission granted the original certificate to build the Florida Gas system. Without the transportation services the pipeline would not have been economically feasible. 16 F.P.C. at 132-136. The later certification of the T-3 service greatly strengthened the economic position of Florida Gas and, because of economies of scale caused by larger diameter pipe, resulted in an immediate rate reduction for all of Florida Gas' customers including Petitioners. 37 F.P.C. at 426, 443. It is fair to say that there would be no Florida Gas pipeline and no gas to be curtailed if FP&L and Power Corporation had not obligated themselves to pay many millions of dollars for transportation services over a period of 20 years. The T-1 and T-2 services expired pursuant to their terms in June, 1979; therefore, only the T-3 gas will be affected by the instant proceeding.

The Petitioners (hereinafter called "Florida Cities" or "Petitioners") consist of a group of municipal utilities which purchase gas either directly or indirectly from Florida Gas under interruptible contracts for use primarily in generating electric energy. (Petition p. 5, R 171)[3]

FP&L regards Florida Cities' Statement of the Case as substantially accurate insofar as it is limited to a simple recitation of the procedural history of the *Lehigh Portland Cement Company* v. *Florida Gas Transmission Company* proceeding and the *Ft. Pierce Utility Authority of the City of Ft. Pierce et al.* v. *Florida Gas Transmission Company et al.* proceeding. However, the Statement of the Case contains much argument which will be addressed in the section of this brief headed "Argument".

[3] The prefix R refers to the record page as certified by the Commission to the Fifth Circuit.

ARGUMENT

I. This Proceeding Does Not Involve An Issue Of Vital National Concern; Therefore *Certiorari* Should Be Denied

While the T-3 transportation is of great importance to FP&L and its ratepayers, it is a fairly unique situation and cannot be said to have far-reaching national importance. The T-3 service is by far the largest such service provided by an interstate pipeline and there are only a handful of others.[4]

Thus, the Petition is clearly inaccurate when it states that the Fifth Circuit's decision will result in the release of "potentially vast amounts of natural gas" from regulation. (pp. 18-19) The decision in this case that FP&L's transportation gas is not subject to curtailment has had little nationwide significance and little effect upon Commission regulations issued under the Natural Gas Act and other statutes. As previously indicated, transportation of user-owned gas by interstate pipelines is relatively rare; most pipeline deliveries are sales of the pipeline's own general supply.

The Natural Gas Policy Act (P.L. 95-621) was enacted November 9, 1978 as part of comprehensive national energy legislation. In considering this legislation Congress thoroughly scrutinized the curtailment policies then being implemented by the Commission and

[4] It is recognized that the Commission recently has issued a few one year transportation certificates to replace imported oil. These, however, are, by their terms, temporary expedients during the period of an excess gas "bubble" and are not intended to be a permanent fixture of FERC regulation.

was fully aware of the Commission's stated policy that transportation gas was not subject to curtailment. The fact that Congress did not in the National Energy Act direct the Commission to commence curtailment of transportation gas indicates that Congress did not consider such curtailment would significantly affect the national natural gas shortage. Indeed, the Congress went so far as to explicity provide for the continuation of existing transportation certificates:

> SEC. 404. LIMITATION ON REVOKING OR AMENDING CERTAIN PRE-1969 CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY.
>
> (a) GENERAL RULE.—The Commission may not, during the 10-year period beginning on the date of the enactment of this Act, revoke or amend any certificate of public convenience and necessity issued before January 1, 1969, under section 7 of the Natural Gas Act for the transportation of natural gas owned by any electric utility except upon the application of the person to whom such certificate was issued.

This proceeding is not even of vital concern to Florida Cities. It is clear that curtailment of FP&L's gas would not significantly benefit them. Florida Cities carefully state (Petition, p. 18) that the transportation gas constituted over 60 percent of Florida Gas' volumes at the time of the close of the record, but that percentage has been reduced significantly since June, 1979 when the T-1 and T-2 services terminated. The T-3 service is the only transportation service on Florida Gas' system today; it amounts to 200,000 Mcf per day or less than 30 percent of Florida Gas' current peak deliveries. Even if this gas could be curtailed and title somehow transferred to Florida Gas, it would not all go

to Florida Cities, but would be reallocated among all of Florida Gas' customers, including FP&L, under Florida Gas' curtailment plan.[5] Further, the T-3 service will terminate pursuant to its own terms in 1988 (with a possible substantial reduction in 1983). Therefore, any benefit to Florida Gas' other customers would be limited to this remaining period of time.

II. Decisions In Two Other Circuits Squarely Support The Fifth Circuit's Holding In This Case

Petitioners attempt to rely on three "recent" Supreme Court decisions in an attempt to establish that the Fifth Circuit has misapplied these decisions of the Supreme Court.[6] These three cases are easily distinguishable but there are two decisions in other circuits which squarely support the Fifth Circuit's decision.

The District of Columbia Circuit, in the very "recent" *American Public Gas Association* v. *FERC*, 587 F.2d 1089 (1978) (APGA), considered a Commission rule which would exempt certain user-owned transportation gas from the operation of the transporting pipeline's curtailment plan. The Court rejected arguments that such transportation gas must be subject to the pipeline's curtailment plan, giving heavy emphasis

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[5] The constitutional problems associated with confiscating FP&L's gas and transferring it to a likely unwilling Florida Gas are staggering. Furthermore, as interruptible boiler fuel users, Cities would be at the bottom of any curtailment allocation.

[6] *F.P.C.* v. *Louisiana Power & Light Company*, 406 U.S. 621 (1972); *California* v. *Southland Royalty Company*, 436 U.S. 519 (1978); *California* v. *LoVaca Gathering Company*, 379 U.S. 366 (1965). The *LoVaca* case is not exactly "recent", being 14 years old.

to the fact that the transported gas was not owned by the pipeline:

> . . . the purpose of a curtailment plan is to prescribe the manner in which a pipeline that cannot meet its contractual commitments will curtail deliveries of its *own gas*. [Emphasis in original] 587 F.2d 1098.

The court in *APGA*, specifically distinguishing *LoVaca* (one of the cases relied on by Petitioners), was also aware of the fact that, as here, the transported gas was in a commingled stream with the pipeline's own gas supply, but the court did not consider that this would confer curtailment jurisdiction over gas transported for the owner:

> The fact that, under the Commission's plan, consumer owned gas will be transported in a commingled stream with the pipeline's own gas supply does not create Commission jurisdiction over direct sales. *California* v. *LoVaca Gathering Company*, 379 U.S. 366, 85 S. Ct. 486, 13 L.Ed. 2d 357 (1965), upon which petitioners rely, turned on the potential abuse inherent in the pipeline's ownership of gas purchased in both jurisdictional and nonjurisdictional sales—*a condition not present here*. [Emphasis supplied] 587 F.2d 1097, n. 9.

This language is equally applicable to the gas transported by Florida Gas where there also is no "potential abuse" because the pipeline does not purchase both jurisdictional and nonjurisdictional gas.

The *APGA* case followed a Third Circuit opinion, *Public Service Electric and Gas Company* v. *Federal Power Commission*, 371 F.2d 1 (1967), *cert. denied*, 389 U.S. 849 (1967), issued in January 1967, shortly after *LoVaca*. The Third Circuit specifically limited

LoVaca to situations where commingling of a pipeline's own gas could give rise to abuse.

In the *Public Service* case, Texaco, Inc. delivered its own gas to Transcontinental Gas Pipe Line Corporation (Transco) in Texas and Louisiana. The gas was transported to New Jersey where it was redelivered to Texaco for use in its refinery as an industrial fuel. By contract, the gas remained the property of Texaco although it was commingled with gas traveling in an interstate stream throughout Transco's pipeline from the Gulf Coast to New Jersey. It was clearly recognized by all concerned that the specific molecules of gas delivered to Transco by Texaco would not necessarily be redelivered to Texaco in New Jersey.

Public Service, a local distributor in New Jersey and customer of Transco, opposed the transaction because it wished to make the sale itself. Relying on *LoVaca*, Public Service argued that the Commission had jurisdiction over Texaco's gas once it became intermingled with Transco's. The Third Circuit disagreed:

> The claim to Commission jurisdiction in Lo-Vaca . . . was sustained on facts which are not present in the case now before us. *Texaco is the producer and owner of gas which it proposed to use as an industrial fuel in its refinery at West Deptford. It contracted with Transcon for conventional transportation service for which the latter was to receive a fixed charge per MCF of gas transported. The arrangement would not involve either a sale by Texaco to Transcon or a resale by Transcon to Texaco. The expected commingling of gas owned by Texaco with gas purchased by Transcon for resale would not alter the substance of the transaction.* We are of the opinion that under these circumstances the doctrine of commingling, as applied in Lo-Vaca . . . has no application in the instant case because of the absence of a jurisdictional

> sale for either consumption or resale. Further, the arrangement between Texaco and Transcon was not devised to avoid regulation; in fact, the transaction was cast in a form which made it subject to the jurisdiction which the Commission properly assumed. *Public Service Electric and Gas Company* v. *Federal Power Commission,* 371 F.2d 1, *cert. denied,* 389 U.S. 849, January, 1967. (Emphasis supplied)

The fact situation in the instant case is, in every material respect, identical to *Public Service.* Admittedly, FP&L does not consume gas which it owned during the production stage, as was the case with Texaco. However, the determinative factor is the ownership when the gas enters the jurisdictional facilities of the pipeline. In both cases the gas is owned by the ultimate consumer when it is delivered to the pipeline. The same factual situation that exists in the instant case underlies the *APGA* case where the gas involved clearly was purchased from others before it entered jurisdictional facilities. Thus, there is full agreement among the Third Circuit, the District of Columbia Circuit and the Fifth Circuit that commingling of user-owned transportation gas with pipeline gas does not establish Commission jurisdiction over rates or curtailment.

In the face of such direct support for the Fifth Circuit's holding, Petitioners have had to rely on three cases, which factually and legally are easily distinguishable from the instant proceeding: *F.P.C.* v. *Louisiana Power & Light Company,* 406 U.S. 621 (1972); *California* v. *Southland Royalty Company,* 436 U.S. 519 (1978); *California* v. *LoVaca Gathering Company,* 379 U.S. 366 (1965). None of these decisions held that the Commission has authority to confiscate gas owned

by the user and transported by an interstate pipeline, or to reallocate that gas under the interstate pipeline's curtailment plan. The Fifth Circuit therefore was correct not to extend the Supreme Court's decisions in order to authorize the curtailment of transportation gas.

F.P.C. v. *Louisiana Power & Light Company, supra,* is the landmark case on curtailment of a pipeline's own gas, but it has no relevance whatsoever to curtailment of gas transported by a pipeline but owned by others. Florida Cities contend (Petition, p. 14) that the following language in the *Louisiana* case authorizes the curtailment of transportation gas:

> Curtailment regulations are not *rate-setting* regulations but regulations of the "transportation" of natural gas and thus within FPC jurisdiction under the opening sentence of Section 1(b) that [t]he provisions of this Act shall apply to the transportation of natural gas in interstate commerce . . .

But Florida Cities are quoting this language out of context. The interstate pipeline's direct sale customers in the *Louisiana* case had argued that, because the Commission had no *rate* jurisdiction under the Natural Gas Act over their purchases, that they should also not be subject to the Commission's *curtailment* jurisdiction. The direct sale customers contended that the Commission was basing its curtailment jurisdiction under Sections 4 and 5 of the Natural Gas Act, that these rate provisions could not be applied to direct sales, and therefore the Commission had no curtailment jurisdiction over direct sales. In rejecting this argument of the direct sales customers, the Supreme Court ruled that direct sales were subject to the Commission's trans-

portation jurisdiction, but there was no issue whatsoever of curtailment of transportation gas not owned by the pipeline but transported for others.

Petitioners also rely on the *Southland* case (Petition, p. 15) to argue that ownership of natural gas cannot affect the Commission's jurisdiction to curtail transported gas. *Southland* only held that once gas becomes subject to Commission jurisdiction it cannot lose its jurisdictional status unless an abandonment of the service has been granted under Section 7(b) of the Natural Gas Act. In the instant proceeding, the gas involved never has been jurisdictional. Hence, *Southland* is totally inapplicable.

Southland was not even a curtailment case. In *Southland* the Supreme Court considered whether it was necessary to obtain abandonment authorization under Section 7(b) of the Natural Gas Act in order to terminate deliveries of natural gas from producing acreage which had been dedicated by lessees to the interstate market pursuant to certificates of unlimited duration. The owners of the mineral fee interest of the producing acreage attempted to sell the production to an intrastate purchaser after the expiration under local law of a 50-year lease. The Supreme Court ruled in *Southland* that the contractual terms governing expiration of the lease agreement under local law could not defeat the Commission's jurisdiction once the gas had been dedicated to interstate commerce pursuant to a certificate of unlimited duration. *Southland* was concerned with the concept of abandonment under Section 7(b) of the Natural Gas Act and the concept of dedication of gas to the interstate market.

In the *Sebring* proceeding we are concerned with the issue of the Commission's jurisdiction to curtail

user-owned gas, not with the Commission's abandonment authority. *Southland* did not hold that the Commission has authority to confiscate user-owned gas in order to permit its reallocation by the transporting pipeline. Additionally, FP&L has not dedicated its own gas to Florida Gas' system supply. Therefore the Fifth Circuit correctly held that the *Southland* decision is inapplicable.[7]

Petitioners' reliance upon the *LoVaca* case is also misplaced. (Petition, pp. 16-18). Petitioners argue that "commingling" of FP&L's gas with Florida Gas' supplies establishes the Commission's curtailment jurisdiction. The issue in *LoVaca* was the Commission's jurisdiction over sales of natural gas to an interstate pipeline for its own use. Restrictive clauses in the contracts for the sale of the gas stated that the gas must be used by the pipeline in the State where the gas was produced, and that sales of such gas would not be subject to the jurisdiction of the Commission because it was not sold for resale. The Supreme Court rejected this restricted use argument, and held that once the gas was "commingled" in the interstate pipeline with gas from other sources that at least a portion of the gas would in fact be resold outside its State of origin, thus establishing the Commission's rate jurisdiction over the sales to the interstate pipeline. The facts of the *LoVaca* case are quite different from this proceeding. FP&L never has contended that its gas was not being transported in interstate commerce, but the *LoVaca* decision was concerned with the Commission's

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[7] *Southland* supports FP&L's position in holding that the terms of a certificate must be strictly observed. The terms of the T-3 certificate specify that *all* gas delivered to Florida Gas for FP&L's account must be redelivered to FP&L.

rate jurisdiction, not its curtailment jurisdiction. The Supreme Court was especially concerned that failure to hold the *LoVaca* sales jurisdictional would permit pipelines to discriminate in favor of nonjurisdictional suppliers. 369 U.S. at 369-370. There is no such problem here since none of FP&L's gas is sold to Florida Gas. As previously discussed in this brief, *LoVaca* was specifically distinguished by the courts in *Public Service* and *APGA*. The Fifth Circuit, therefore, correctly decided that the *LoVaca* case is inapplicable.

III. Florida Cities Have Not Been Treated Unfairly

Florida Cities argue (Petition pp. 19-20) that to be "fair" *certiorari* should be granted because their use of natural gas is similar to FP&L's use of natural gas, and because Florida Cities have made allegations of monopoly practices, and "illegal transactions."[8] All of these arguments are without any foundation and hardly present grounds for a grant of *certiorari*.

First, there are significant practical and economic differences between Florida Cities' purchase of natural gas and FP&L's purchase of gas. FP&L bound itself to long-term firm contracts and therefore undertook the risk that the delivered cost of natural gas might increase compared to the cost of oil. Florida Cities undertook none of these risks, chose to buy cheaper interruptible gas, and was free to switch to oil if oil costs declined.

Second, as the Fifth Circuit correctly ruled, a mere allegation of anticompetitive effects does not confer

[8] Florida Cities apparently are not concerned about the unfairness of confiscating gas which has been under contract to FP&L for over ten years.

jurisdiction upon the Commission where it does not otherwise exist. (Petition, Appendix A-35, n. 58) Florida Cities' allegation of monopolistic behavior is an attempt to bootstrap jurisdiction; if jurisdiction to curtail transportation gas does not exist in the first place no allegation of anticompetitive effects can confer it.

Third, Florida Cities' general allegation of "illegal transactions" on the part of others are matters that are being considered in another proceeding at the Commission. (Docket No. IN78-2) There never has been the slightest official inference of wrongdoing on the part of FP&L. Again, since the Commission lacks jurisdiction to curtail the transportation gas, any allegation of wrongdoing, even if proved, would not confer jurisdiction upon the Commission.

CONCLUSION

For the foregoing reasons, the Petition for *certiorari* should be denied.

Respectfully submitted,

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July 18, 1979

CERTIFICATE OF SERVICE

I hereby certify that I have this day served copies of this Brief in Opposition in accordance with Rule 33 of the Supreme Court of the United States.

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Attorney for
Florida Power & Light Company

July 18, 1979

No. 78-1878

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

THE SEBRING UTILITIES COMMISSION, THE FORT PIERCE UTILITIES AUTHORITY OF THE CITY OF FORT PIERCE, THE GAINESVILLE-ALACHUA COUNTY REGIONAL ELECTRIC WATER & SEWER UTILITIES, AND THE CITIES OF HOMESTEAD, KISSIMMEE, LAKELAND, STARKE AND TALLAHASSEE, FLORIDA,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF RESPONDENT AMOCO PRODUCTION COMPANY IN OPPOSITION TO PETITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

ADMINISTRATIVE DECISIONS:

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

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BRIEF OF RESPONDENT AMOCO PRODUCTION COMPANY IN OPPOSITION TO PETITION

Amoco Production Company (Amoco), an intervenor in support of respondent Federal Energy Regulatory Commission (Commission) below and a respondent here, submits this brief in opposition to the Petition for Writ of

Certiorari to review the judgment entered in this case on March 20, 1979.

COUNTERSTATEMENT OF THE CASE

This case involves review of Commission orders disclaiming jurisdiction to order an interstate pipeline to "curtail" and "reallocate" to others natural gas volumes to which the pipeline has no legal title, but is merely transporting for the owner thereof. Brief reference must thus be made to the context in which the specific orders were issued as well as to clarify Amoco's involvement in this case:

1. Amoco's Sale to FP&L and Transportation by FGT on Behalf of FP&L.

Florida Power & Light Company (FP&L) is an electric generating, transmission and distribution company, operating entirely within the State of Florida, which purchases natural gas directly from producers in Texas and Louisiana (R. 306C).[1]

Florida Gas Transmission Company (FGT) operates a major interstate natural gas pipeline which originates in Texas, traverses the coast of the Gulf of Mexico eastward, and terminates near Miami, Florida. In addition to purchasing natural gas for resale by it, FGT also transports to the State of Florida the gas purchased in the field by two major electric generating companies which operate in Florida, FP&L and Florida Power Corporation (FP). These transportation volumes increase FGT's load requirements and allow it to operate more efficiently (Appendix A, p. A-7).[2]

[1] Suffix "C" denotes the record page certified by the Commission in the *Sebring Utilities Commission* v. *Federal Energy Regulatory Commission*, 5th Circuit No. 77-2972 (Involves review of certain FERC orders in Docket No. CP77-147.)

[2] References with the prefix "A" denote pages in Petition for Writ of Certiorari or attached appendices.

On March 12, 1965, Amoco, formerly Pan American Petroleum Corporation, contracted to sell to FP&L up to 200,000 MMBTUs of natural gas per day for twenty years.[3] This contract is a warranty-type contract under which no specific fields, leases or sources of supply are dedicated or committed to the performance of the contract (R. 205C).

Amoco's sale to FP&L is a direct sale not subject to the Commission's[4] jurisdiction under Section 1(b) of the Natural Gas Act (Act)[5] (R. 290C and 306C). However, FGT's transportation of this gas for FP&L is subject to the Commission's jurisdiction. Accordingly, FGT filed a certificate application on June 9, 1965, in Docket No. CP65-393 for authorization to construct and operate additional pipeline facilities and to transport FP&L's gas (R. 376C). Title to the gas transported for FP&L was never vested in FGT (R. 2262L and 2268L),[6] and FGT warranted that its transportation of FP&L gas would not in any way encumber FP&L's title (R. 150C).

After a hearing on FGT's application the Commission on March 1, 1967, issued an opinion and order in Docket No. CP65-393 certificating the requested transportation service. *Florida Gas Transmission Company*, 37 FPC 424 (Opinion No. 516) (1967), (R. 289C, 290C, 2268L).

[3] Austral Oil Company was also a party-seller under this contract and the Commission recognized that other sellers might be added in the future. The corporate warranty under the contract, however, is that of Amoco alone.

[4] The term "the Commission" refers to the predecessor agency, the Federal Power Commission, as well as the Federal Energy Regulatory Commission.

[5] 15 U.S.C. § 717(b).

[6] Suffix "L" denotes the record page certified by the Commission in the *Sebring Utilities Commission* v. *Federal Energy Regulatory Commission*, 5th Circuit No. 77-2911 (Involves review of certain FERC orders in Docket No. RP75-79). On March 20, 1978, the Fifth Circuit ordered this case consolidated with No. 77-2972.

The Commission specifically stated, "The principal and overriding issue in this case is whether the sales by the producers, Pan Am and Austral, are jurisdictional. We hold they are not." Id. at 427-431.

Subsequently, all parties agreed to a stipulation and agreement whereby the Amoco-FP&L contract was modified to reduce the total warranty amount and to provide that after 15 years from the date of initial deliveries, the "warranty" would be deleted and Amoco would be obligated for five years to deliver to FP&L the production from those wells then delivering gas to FP&L. FGT filed this settlement with the Commission for its approval. On May 29, 1967, the Commission issued an order approving the settlement agreement and amending its March 1, 1967 opinion in accordance with this settlement. *Florida Gas Transmission Company*, 37 FPC 993 (1967). Transportation of FP&L's gas by FGT is in accordance with this certificate issued by the Commission.

2. Commission Orders Issued in Docket No. CP77-147 (Fifth Circuit No. 77-2972).

On January 18, 1977, the Ft. Pierce Utility Authority of the City of Ft. Pierce, *et al.* (Florida Cities) filed with the Commission pursuant to Section 1.6 of the Commission's Rules of Practice and Procedure,[7] in Docket No. CP77-147, a petition and complaint seeking "curtailment" and "reallocation" of the gas FGT transported for FP&L under the certificate issued in Docket No. CP65-393 (R. 168-271C). Amoco filed a response on March 30, 1977, denying Florida Cities' contention that the Commission could order curtailment of gas *not owned* by FGT (R. 287-290C).

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[7] *Ft. Pierce Utility Authority* v. *Federal Power Commission*, 526 F.2d 993,999 (5th Cir. 1976).

On August 3, 1977, the Commission issued an order in Docket No. CP77-147 dismissing Florida Cities' petition and complaint stating:

> "However, we do not concur with Cities in curtailing the T-gas under any of the contracts because such gas is *not owned* by Florida Gas and does not form a part of the system's gas supply from which gas can be allocated to its various customers.
>
> "Although the transportation gas flows through Florida Gas' pipeline, it already has been purchased by FPL and Florida Power prior to its transportation by Florida Gas to points of destination in Florida. Since legal title to the gas has vested in the two power companies prior to its interstate transportation, we do not believe that the *Louisiana Power and Light* and *LoVaca Gathering Company* cases are applicable herein for purposes of Cities' request." (Appendix C-4, p. A-92, emphasis added).

In an order denying rehearing of its August 3rd order, the Commission on September 30, 1977, reiterated its position that the gas being transported for FP&L is not owned by FGT, and, therefore, is not subject to FGT's system-wide curtailment as is the gas FGT owns and delivers to its direct and resale customers (Appendix C-5, pp. A-95 - A-100).

3. Commission Orders Issued in Docket No. RP75-79 (Fifth Circuit No. 77-2911).

In Opinion No. 807, issued June 24, 1977, in Docket No. RP75-79, the Commission found that the "place of transportation gas" should be considered in the hearings on FGT's new curtailment plan. Accordingly, FP&L and FP were joined as parties (Appendix C-1, p. A-62).

However, on rehearing, the Commission issued Opinion No. 807-A on September 22, 1977, revoking the joinder of FP&L and FP and excluding the transportation gas

from the curtailment proceedings in Docket No. RP75-79. This order adopts and affirms the rationale of the Commission's August 3, 1977 order in Docket No. CP77-147, which refused to order curtailment of transportation gas "because such gas is not owned by FGT and does not form a part of the system's gas supply from which gas can be allocated to its various customers." (Appendix C-2, p. A-74). This holding was again affirmed in the Commission's "Order Denying Rehearing," issued November 21. 1977, in Docket No. RP75-79 (Appendix C-3, pp. A-81 - A-86).

4. The Court of Appeals Decision.

The Fifth Circuit's decision affirmed the Commission's position and policies enunciated in the various orders on review (Appendix A, pp. A-1 - A-35).

First, FGT's curtailment plan was deemed unduly discriminatory, in that it granted a preference, without a reasonable basis for distinction, to indirect industrial customers over direct industrial customers. In arriving at this decision, the Fifth Circuit recognized "the Commission's duty to protect the public interest in the allocation of scarce supplies of natural gas" (p. A-20) and gave complete recognition to the Commission's curtailment jurisdiction over sales to direct and indirect customers. *Federal Power Commission* v. *Louisiana Power and Light Company*, 406 U.S. 621 (1972). To the extent that a discriminatory curtailment plan is rooted in customer contracts, "the Commission is not bound by agreements among parties *subject to its jurisdiction.*" *American Smelting & Refining Co.* v. *Federal Power Commission*, 494 F.2d 925, 934 (D.C. Cir. 1974), *cert. denied sub nom., City of Willcox* v. *Federal Power Commission*, 419 U.S. 882 (1974) (emphasis added) (p. A-17).

Secondly, the Fifth Circuit found that when the Commission finds a pipeline's curtailment plan to be unduly

discriminatory, Section 5 of the Act does not require the Commission to fashion immediate interim relief.[8]

Finally, in accordance with the Act and prior case law, the Fifth Circuit affirmed the Commission orders on review denying curtailment jurisdiction over gas transported but not owned by FGT. The Court found that legal title to this gas passed from the producers to FP and/or FP&L prior to its delivery to FGT for transportation to Florida, and held (p. A-12):

> "FGT stands in the position of a bailee in relation to FP and FP&L. We think that the Commission correctly determined that because FGT never owned the gas, it could not be compelled to allocate it to others. The transportation gas has never been a part of the supply to FGT for satisfaction of its sales contracts. We see no authority for making it so now." (p. A-34).

The Petition for Writ of Certiorari seeks review of only the Fifth Circuit's decision on this final issue.[9]

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[8] 15 U.S.C. § 717d.

[9] Petitioners also allude to a "secret arrangement" between Amoco and FGT in their footnote 10 on page A-9 of the Petition. The matters discussed therein are the subject of a separate Commission investigation in Commission Docket No. IN78-2. The subject matter of the investigation and the investigation proceeding are immaterial and irrelevant to this case, which accords with the manner in which the Commission and the Fifth Circuit treated these separate matters.

ARGUMENT

The Petition does not set forth questions, grounds, or reasons requiring or warranting review by this Court.

I. THE FIFTH CIRCUIT'S RULING ON THE TRANSPORTATION GAS ISSUE IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT; THEREFORE, CERTIORARI SHOULD BE DENIED.

In affirming Commission orders which denied "curtailment" jurisdiction over gas transported by but not owned by FGT, the Fifth Circuit's decision is totally consistent with the Natural Gas Act and federal court decisions, including the three opinions of this Court relied upon by Petitioners.[10]

Petitioners first cite *Federal Power Commission* v. *Louisiana Power & Light Company, supra,* as support for their contention that the Commission has curtailment jurisdiction under Section 1(b) of the Natural Gas Act over gas not owned by FGT. However, that case involved only the curtailment of direct sale gas owned by the pipeline, not gas owned by others and which is only transported by the pipeline. The issue of ownership of such transported gas was never raised or even alluded to in *Louisiana Power* because all the gas involved was initially owned by the pipeline. The pipeline transported and sold this gas to direct and resale customers and such gas is subject to curtailment allocations. However, in this case, the issue is not whether the Commission has authority to so curtail a pipeline's own gas, but whether the Commission can reallocate gas which does

[10] *Federal Power Commission* v. *Louisiana Power & Light Company,* 406 U.S. 621 (1972); *California* v. *Southland Royalty Company,* 436 U.S. 519 (1978); and, *California* v. *Lo-Vaca Gathering Company,* 379 U.S. 366 (1965).

not belong to the pipeline, but which belongs to a utility company and is only transported by the pipeline. Thus, there is no conflict between the holding below and *Louisiana Power.*

Petitioners next allege that the Commission's failure to exercise "curtailment" jurisdiction over the gas transported by FGT creates regulatory gaps in the administration of the Act (p. A-15).

However, in granting FGT authorization to transport gas for FP&L, the Commission specifically referred to this "gap" question and decided none existed. 37 FPC 432-442. The Commission's regulatory control over FGT's transportation rate and its authority to condition the original certificate were deemed sufficient to protect the public interest. FP&L thus could not receive any of the gas it purchased from Amoco until the Commission was satisfied in 1967 that the transportation service by FGT was in the public interest.

Petitioners' reading of *California* v. *Southland Royalty Company, supra,* also misinterprets this Court's holding. In *Southland Royalty,* this Court held that once gas had been dedicated to a jurisdictional sale in interstate commerce, the regulatory status of the gas changed, and there could be no abandonment of interstate service until Commission authorization was obtained, regardless of whether the party dedicating the gas had continuing title to it. In that case the producer had dedicated the gas from certain leases to a jurisdictional sale in interstate commerce by selling it to an interstate pipeline under a certificate of unlimited duration. This Court stated:

> "This issuance of a *certificate* of *unlimited duration* covering the gas at issue here created a federal obligation to serve the interstate market until abandonment authorization had been obtained.
>
> * * * *

> "But gas which is '*dedicated*' pursuant to the Natural Gas Act is not surrendered to the public; it is simply placed within the jurisdiction of the Commission so that it may be *sold* to the public at the 'just and reasonable' rates specified by § 4(a) of the Act." 436 U.S. at 526-527 (emphasis added).

The present case is clearly distinguishable from *Southland Royalty* since the gas Amoco sells directly to FP&L for FP&L's consumption has never been dedicated to a jurisdictional sale for resale in the interstate market and, therefore, such gas never has been subject to Section 4 (a) or Section 7 of the Act. The Amoco sale to FP&L is a non-jurisdictional sale for which a certificate of public convenience and necessity has not been and is not required of either Amoco or FP&L. Consequently, the Fifth Circuit correctly held *Southland* to be inapplicable to this case (p. A-34).

The "commingling doctrine" developed in *California* v. *Lo-Vaca Gathering Company*, *supra*, also is not applicable to this case. This Court recognized that doctrine was not all-inclusive, stating that whether "in spite of original commingling there might be a separate so-called non-jurisdictional transaction of a precise amount of gas not-for-resale within the meaning of the Act is a question we need not reach." 379 U.S. at 370 (citations omitted). This Court in *Lo-Vaca* thus did not reach a decision involving the Commission's jurisdiction over gas *not* owned by a pipeline. As the Third Circuit subsequently ruled, *Lo-Vaca* is inapplicable to gas transported but not owned by an interstate pipeline because of the absence of a jurisdictional sale. *Public Service Electric and Gas Company* v. *Federal Power Commission*, 371 F.2d 1, 5 (3rd Cir. 1967), *cert. denied*, 389 U.S. 849 (1967). Thus, there is no basis for Petitioners' contention that the transportation gas in this case should be treated like the compression gas owned by the pipeline

in *Lo-Vaca* (p. A-18), and the decision below does not conflict with *Lo-Vaca*.

II. CERTIORARI IS NOT WARRANTED IN VIEW OF THE SETTLED NATURE OF THIS ISSUE.

The principle that a pipeline cannot "curtail" gas it transports but does not own has been repeatedly recognized by the Commission and the federal courts. The Commission's ability to efficiently administer the Natural Gas Act is dependent upon such consistent interpretations of the duties and obligations imposed upon producers, pipelines, and consumers pursuant to various provisions of the Act. What Petitioners recommend would create utter chaos in the natural gas industry.

Pipeline *ownership* of gas has been and must be the determining factor in deciding what gas a pipeline may lawfully curtail or allocate. Therefore, as the courts hold, the Commission is without jurisdiction to order the curtailment of gas transported but not owned by an interstate pipeline. Thus, in a recent case involving a review of the Commission's policy of allowing pipelines to transport gas owned by end-users who were suffering curtailment of gas volumes needed for high priority uses,[11] the District of Columbia Circuit held these transported volumes were not subject to pipeline curtailment. *American Public Gas Association, et al.* v. *Federal Energy Regulatory Commission*, 587 F.2d 1089 (D.C. Cir. 1978).

> "[T]he purpose of a curtailment plan is to prescribe the manner in which a pipeline that cannot meet its contractual commitments will curtail deliveries of its *own* gas." 587 F.2d at 1098.

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[11] *Policy with Respect to Certification of Pipeline Transportation Agreements*, Docket No. RM75-25, (Order No. 533, August 28, 1975).

This ruling is buttressed by other Commission and court decisions over the past fourteen years, and the holding below is consistent.[12]

Petitioners also assume that, "if the decision below is affirmed, potentially vast amounts of natural gas will be exempted from regulation." (p. A-19). This is not correct, as the Commission has authority to grant or deny an application to transport gas for others. See, *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corporation*, 365 U.S. 1 (1965). Under Section 7(e) of the Act, the Commission also may attach "such reasonable terms and conditions as the public convenience and necessity may require." The Commission can and has attached various types of conditions to transportation certificates, *e.g.* source of gas, end-use of gas, price, and duration of certificate.

Section 608 of the Public Utility Regulatory Policies Act of 1978[13] adds Section 7(c)(2) to the Natural Gas Act to specifically provide for the transportation of gas not owned by a pipeline.

> "The provision is intended to remove any uncertainty which may exist regarding the basis for present Federal Energy Regulatory Commission policy regarding the transportation of user-owned natural gas by interstate pipelines. However, the conference substitute is not intended to require the Commission to issue a certificate of public convenience and necessity in any specific case. The question of whether to issue a certificate is left to the Commission based upon its determination of whether the transportation of the gas will serve the public convenience and necessity. In addition, limitations are not imposed on the exercise of this authority by the Commission other than the public convenience and necessity standard which is generally applicable to certification by the Commission of natural gas transportation." *Public Utility Regulatory Policies Act of 1978*, H.R.Rep. No. 95-1750, 95th Cong., 2nd Session 119 (1978).

It thus would be contrary to prior Commission and judicial construction of the Act, as well as the intent of Congress, to hold that the Commission may order the curtailment of gas transported but not owned by a pipeline.

III. ALL RELEVANT FACTORS WERE CONSIDERED BY THE COMMISSION AND BY THE FIFTH CIRCUIT.

Petitioners' argument that this Court should consider the "practical consequences" of the Fifth Circuit's decision is without merit. The Commission previously considered all relevant factors, including the question of substantial evidence, before ruling FP&L's gas could not be included in FGT's curtailment plan. Despite Petitioners' disclaimers to the contrary, ownership of gas is an important distinction in the administration of the Act. As to natural gas not owned by FGT, the Commission lacks jurisdiction to order its curtailment and reallocation among FGT's customers according to end-uses. Upon consideration of all the circumstances, including the issues mentioned by Petitioners, the Commission correctly concluded, and the Fifth Circuit correctly affirmed, that

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[12] *Transcontinental Gas Pipe Line Corporation*, 33 FPC 237 (1965), *aff'd sub nom. Public Service Electric Gas Company* v. *Federal Power Commission*, 371 F.2d 1 (3rd Cir. 1967), *cert. denied*, 389 U.S. 849 (1967); *Transcontinental Gas Pipe Line Corporation*, Docket No. RP72-99 (Opinion No. 778-A, December 8, 1976); *Policy With Respect To Certification of Pipeline Transportation Agreements*, Docket No. RM75-25 (Order No. 2, February 1, 1978); *Certification of Pipeline Transportation for Certain High Priority Uses*, Docket No. RM79-18 (Order No. 27, April 23, 1979); and, *Transportation Certificates for Natural Gas For the Displacement of Fuel Oil*, Docket No. RM79-34 (Order No. 30, May 14, 1979).

[13] 16 U.S.C. § 2601 *et seq.*

gas ownership is the controlling factor in deciding what natural gas volumes are subject to pipeline curtailment.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be denied.

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